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A LOCAL ACT FOR SOCIAL INSURANCE IN THE EIGHTEENTH CENTURY

B. Keith-Lucas

It may be that historians of the future will regard the present age as distinguished above all things by the system of social security introduced by the series of statutes which included the National Health Service Act, 1946, the National Insurance Act, 1948, and the National Assistance Act, 1948.

Lord Beveridge has shown in his book *Voluntary Action* that the origin of much of this system of social insurance is to be found in the friendly societies and clubs of the eighteenth century. Such voluntary associations existed in a very large number of towns and villages, and offered to a considerable proportion of the working classes a simple form of insurance, through which they could provide against the discomfort of old age " on the parish " and the disgrace of a pauper's funeral. In many cases, however, these societies suffered from the dishonesty of their officers and from the high proportion of their income which was consumed in the free issue of beer at their monthly meetings; for example, in the case of a club at Tavistock in 1764 every member was allowed a free pint of ale and the clerk and stewards a quart at every meeting. Other clubs decayed because, as the original members grew old, they came to depend on the subscriptions of younger men joining the club. Instead of doing so, however, the next generation often preferred to found a new club for themselves, free from the burden of supporting their predecessors. The original clubs thus decayed, and frequently finished by dividing the remaining funds among the surviving members. Many of them, however, survived; in Devonshire today the village club is still a common institution, but now serving a social rather than an economic purpose.

These voluntary associations received official encouragement and protection under an Act of 1793 promoted by George Rose, an intimate friend of the younger Pitt. Many influential people throughout the country believed that through an extension of this system of organised thrift a solution might be found to the problem of pauperism, and the Poor Rates, which weighed heavily upon the country squires, be reduced.

In 1768 the Sheriff of Devonshire summoned a County Meeting of the Gentlemen, Clergy and Freeholders, and a scheme was laid before them for establishing a general system of social insurance throughout the county.[1] Some, apparently, were doubtful whether the labourers could afford to pay the monthly subscriptions, but the poor of a number of parishes submitted a petition in favour of the proposals to Mr. George Fursdon,[2] one of the principal landowners of the county. They asked him "to assure the Gentlemen of the County, that the above scheme has been duly examined and considered by us, who entirely approve of the same, and are extremely desirous that it should pass into a Law, and hope it will be immediately carried into Execution; as 'tis from experience most of us know, that it will be greatly for our Benefit and Relief."[3]

County Meetings of this sort were at that time a recognised part of the Constitution; probably a survival of the old county courts, they were frequently summoned by the sheriff to enable the freeholders to express the common opinion of the county.[4] On this occasion a petition was prepared, asking the House of Commons to pass a Private Act establishing a general scheme of insurance for the county. The conduct of the business was entrusted to one of the County Members, John Parker (who later became Lord Boringdon), and the Quarter Sessions ordered that his expenses (which amounted to £151 8s.) should be paid out of county funds.[5]

The Bill was introduced and passed through both Houses with little opposition, and duly received the Royal Assent.[6] The main provisions of the Act were as follows:—

1. In every parish in Devonshire the ratepayers may assemble on Easter Monday to compile a list of substantial householders from which the Justices shall choose two or more to act as stewards.
2. Every inhabitant between 21 and 41 years of age may become a subscriber on the following scales:—
   (a) Labourers not possessed of land worth £10 p.a. nor stock worth £300 .. .. 6d. per month
   (b) Women as above .. .. .. 4d. ,, ,,

[1] *Journals* of the House of Commons, 32, p. 127.
[2] George Fursdon of Cadbury, Devonshire, Sheriff of Devonshire in 1752, who appears to have been one of the originators of the scheme.
[3] Quoted in *A Plan for rendering the Poor independent on Public Contributions; founded on the Basis of the Friendly Societies called Clubs*, by the Rev. John Acland, 1786.
[4] See Henry Jephson, *The Platform*, Vol. I, pp. 167–172.
[5] MS. records at Exeter Castle, for details of which I am indebted to Mr. H. A. Davis, the Clerk of the Peace.
[6] 8 & 9 Geo. 3, c. 82. No copies of the Bill appear to survive, and the only copy of the Act which I have discovered is the original manuscript in the House of Lords.

(c) Richer people on a scale up to—
Freeholders of land worth £30 p.a.
or more .. .. 3s. per month

(d) Others as they think fit.

3. The benefits for subscribers of one year's standing or more to be as follows:—

(a) When ill, subscribers to report to one of the Stewards, who will, if necessary—

(i) Send, free of charge, the apothecary or surgeon (a skillful apothecary or surgeon employed by the vestry and paid out of the fund, at not more than £5 5s. per annum).

(ii) Provide free drugs and medicine (a stock of which was to be kept in a box or chest in some secure place).

(iii) Make weekly payments on the following scale :—

6d. subscribers	6s. 0d.	per week for 2 months, or until he can walk abroad, thereafter per week until he can work			3s. 0d.
4d.	,,	3s. 0d.	,,	,,	2s. 0d.
1s. 0d.	,,	7s. 0d.	,,	,,	3s. 6d.
2s. 0d.	,,	8s. 0d.	,,	,,	4s. 0d.
2s. 6d.	,,	8s. 6d.	,,	,,	4s. 6d.
3s. 0d.	,,	9s. 0d.	,,	,,	4s. 6d.
above 3s. 0d.	,,	double the monthly subscription up to 10s., and half the amount above 10s.			

Stewards may with the consent of the Vestry extend the period from two to four months. No payments (except to 4d. and 6d. subscribers) without a certificate that the applicant is a proper object of relief. No payment for injury due to crime or venereal disease.

(b) Subscribers of 10 years' standing are entitled on becoming incapacitated by old age to pensions as follows:—

6d. subscribers	..	..	2s. 6d.	per week
4d. ,,	..	..	2s. 0d.	,, ,,
1s. 0d. ,,	..	..	3s. 6d.	,, ,,
2s. 0d. ,,	..	..	4s. 0d.	,, ,,

2s. 6d. subscribers .. .. 4s. 6d. per week
3s. 0d. ,, ... 4s. 6d. ,, ,,
above 3s. 0d. ,, ... 5s. 0d. ,, ,,

(c) 4d. and 6d. subscribers on marrying another subscriber to receive 20s.

(d) 4d. and 6d. subscribers on the birth of a child to receive 20s.

(e) 4d. and 6d. subscribers on death to receive 20s. for funeral expenses.

4. Any deficiency in the fund is to be made up out of the Poor Rate and any balance over £50 to be invested.

Not all the parishes of the county put the Act into operation, but where this was done there appears to have been a great demand from the poorer people to become subscribers. The solvency of the scheme, however, depended upon its being supported not only by the poor but also by the richer inhabitants, who would receive less in benefits than they paid in subscriptions.

Three years later the scheme had proved to be financially unsound, and another County Meeting was called to consider the matter. It was unanimously decided to petition Parliament for the repeal of the Act.[7] In the petition it was alleged that the Act "hath been found ineffectual to answer the Purposes for which it was intended, and would, if continued in Force, be found extremely burthensome and oppressive to the several Parishes in the said County, which were proposed to be relieved thereby." A witness, who was examined by the Committee of the House of Commons to which the repealing Bill was referred, stated that "no Money had been subscribed except by Persons of the very lowest Class, and in very few Places—that in small Parishes they could not afford to buy and keep Medicines as the Act directs; and that it is in many Respects inconvenient to put the said Act into Execution."[8]

The application for the repeal of the Act was supported by a petition from the magistrates of the county, asking for the inclusion of a clause to enable the parish authorities to use the Poor Rates for making good to subscribers the deficiencies in the funds.

The Act of 1769 was thus repealed, and this first experiment in a statutory scheme of social insurance was abandoned. The reasons for its failure are explained in the extracts which have been quoted from the *Journals* of the House of Commons, but further light is shed on the matter by a pamphlet published in 1786 by the

[7] *Journals* of the House of Commons, 34, p. 10.
[8] *Journals* of the House of Commons, 34, p. 22.

Rev. John Acland, Rector of Broadclyst and a Justice of the Peace for the county of Devon.[9] He explained that "if a Subscriber married with a Subscriber, each of them was entitled to the sum of Twenty Shillings on their Marriage, and likewise on the Birth of every living Child. A Provision this of Great Humanity, as well as of sound Policy: But which, nevertheless, proved the sole Occasion for the Repeal of the Act. For as it was left entirely optional in the Pauper whether he would subscribe, or not, and there was no other Allurement held out to induce him, the only Persons, that did subscribe, were those, that had Matrimony in View. The Consequence of this was, that in the Space of Two or Three Years the Demands for Births and Marriages drew out of a Fund, for the deficiencies whereof the Parishes were responsible, near double the Sum, that had been paid into it: This, very soon, began to be sensibly felt, and the Gentlemen of the County, finding the Poor Rates to increase, were, without any further Consideration, in a mighty hurry to get the Act repealed."

Despite this failure, Mr. Acland retained his faith in the principle of insurance, and in his pamphlet he put forward new proposals which, while copying much of the previous scheme, avoided the mistakes which had led to its failure. His proposed scale of subscriptions ranged from 2d. a week (1½d. for women) to a maximum of 1s. a week. The benefits, based on the assumption that one in forty-eight of the subscribers might be sick at any one time, were more generous than those under the Act of 1769. Old age pensions would begin at a low rate at the age of 65, and increase when the pensioner reached the age of 70, and again at 75, unless he was incapacitated, in which case the full rate became payable at once. Sick pay (called "bed-lying money") would be paid for a maximum of four months, and thereafter "walking money" at half the rate would be payable. During sickness a subscriber would be entitled to children's allowances at the rate of 1s. 4½d. for each child after the second. Free medicine and medical attention would also be provided. The organisation he proposed, though administered by parish and county officials, would be on a national basis. He intended also to include within his scheme "a Class of Men who are not already exempted from Subscriptions, but whom it should be a Cruelty to oblige to it, and almost as cruel, not to give them the Benefit thereof without subscription; I mean the Men who fight our

[9] *A Plan for rendering the Poor independent on Public Contributions.* I am indebted to Sir Richard Acland, Bart., M.P., for lending me a copy of his ancestor's pamphlet. There is no copy in the Bodleian Library and only an incomplete one in the Cambridge University Library.

Battles for us, for the poor Consideration of 5d. a Day." Private soldiers he proposed therefore should be admitted without subscription, their benefits being borne by the subscriptions of the richer contributors. Sailors would also be admitted, but their contributions would be paid out of naval prize money and the customary deductions from their pay.

The failure of the earlier scheme was greatly due, in Acland's opinion, to membership being voluntary; he therefore proposed that in his it should be compulsory. Those who refused to subscribe should, he suggested, be " badged with the word DRONE in large letters of Red Cloth, sewn upon their outer Garment . . . be it Coat, Great Coat, or Waistcoat on the one, or Gown, Cloak or Stays, etc., on the other." The penalty for appearing without this badge would be a month in the House of Correction. He proposed also that all subscribers should be freed from the restrictive laws of settlement and removal : a privilege which Rose's Act of 1793 extended to all members of friendly societies.

Acland's scheme attracted considerable attention; Richard Price, one of the leading economists of the day, approved it,[10] and Sir Frederick Eden, in his great work *The State of the Poor*, praised it highly, but the Rev. John Howlett, a more conservative political economist, criticised it severely.[11] A Bill, based on Acland's proposals, was introduced by some of his friends in 1788, but was quickly dropped.[12]

Proposals for the encouragement of friendly societies were included in a number of local Acts about this time, but there was only one other attempt made to establish a system of social insurance on so large a scale. In 1772, a scheme for enabling the poor to purchase life annuities was put forward by Baron Maseres, an eccentric lawyer and reformer.[13] The proposal had the support of Dr. Price, Benjamin Franklin, Edmund Burke, Sir George Savile and others. William Dowdeswell, who had been Chancellor of the Exchequer, agreed to introduce a Bill which Maseres prepared. This was debated in the House of Commons and passed by a large majority. In the House of Lords, however, it was defeated in consequence of a speech by Lord Camden, the ex-Lord Chancellor.[14]

[10] Letter by Dr. Price appended to Acland's pamphlet.
[11] *The Insufficiency of the Causes to which the Increase of our Poor and the Poor's Rates have been generally ascribed*, 1788.
[12] Speech by Thomas Gilbert, *Hansard*, Dec. 10, 1787.
[13] Francis Maseres was Cursitor Baron of the Exchequer. Charles Lamb remembered him in the early nineteenth century in the Inner Temple, still dressed in the costume of the reign of George II. His proposals were put forward in a book, *Proposals for establishing Life Annuities in Parishes*.
[14] Maseres, *The Principles of the Doctrine of Life Annuities*, 1783.

As the cost of relieving the poor grew heavier, more attention was paid to an alternative solution to the problem—that of the workhouse test and the doctrine of less eligibility implicit in the Poor Law Amendment Act of 1834. The idea of a general system of social insurance faded out of men's minds. Many of the friendly societies, however, survived, and grew in importance until they played a major part in shaping the policy of social insurance that exists today. The Devon Poor Act of 1769 and John Acland's scheme have been forgotten, but yet are perhaps worthy of some memorial as forerunners of the present system.

JURISDICTION TO WIND UP FOREIGN COMPANIES

K. LIPSTEIN

I

UNTIL recently it was possible to state with some confidence that English courts have no jurisdiction to wind up a foreign unregistered company which, though carrying on business in England through agents or otherwise, has no place of business here.[1] The term "place of business" was given a very extended meaning in the course of time and came to include the premises of a hotel where the directors of the foreign company stayed annually over a number of years for a period lasting from a few weeks to several months, and from which they conducted their business while in England.[2] However, in 1950, Harman J., in *Banque des Marchands de Moscou (Koupetschesky) (in liquidation)* v. *Kindersley*,[3] decided that a foreign unregistered company which has assets in England can be wound up by English courts, even if it has no place of business in England otherwise than through agents. The Court of Appeal[4] upheld the decision of Harman J. but Sir Raymond Evershed M.R., in whose judgment the other members of the court concurred, took a different view of the facts. He found that even if the Banque des Marchands de Moscou had no branch or specific place of business in England, it had nevertheless a place of business in England in the extended meaning given to this term by Cohen J. in *Rabenek's Case*,[5] seeing that one of its directors had transacted business for the bank in England. This reason would have sufficed to dispose of the question whether English courts, in the circumstances, had jurisdiction to wind up the foreign company. However, the Master of the Rolls went on to reject as artificial the principle laid down by Cohen J. in *Rabenek's Case*[6] that for the purpose of winding up a

[1] A foreign unregistered company is a company incorporated abroad, which is not registered under Part X of the Companies Act, 1948. See below, note 40. Dicey, *Conflict of Laws* (6th ed., 1949), p. 291, rule 46 (3); p. 293, rule 47 (3); Graveson, *Conflict of Laws*, p. 235; Palmer, *Company Law* (19th ed., 1949), p. 450; Halsbury, *Laws of England*, Vol. 5 (2nd ed., rev. 1949), pp. 942–43, No. 1599; not clear: Wolff, *Private International Law* (2nd ed., 1950), p. 91; Schmitthoff, *Conflict of Laws* (2nd ed., 1948), p. 340.

[2] *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404, at p. 409, *per* Cohen J. (as he then was).

[3] [1950] 2 All E.R. 105; 66 T.L.R. (Pt. 1) 1147.

[4] [1951] 1 Ch. 112; (1950) 66 T.L.R. (Pt. 2) 654; [1950] 2 All E.R. 549.

[5] *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404.

[6] *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404, at p. 409.

place of business, however temporary or general in character, was required and proceeded to show that a foreign unregistered company can be wound up even in the absence of a place of business in England if assets are available there and there are persons, such as individuals claiming to participate in the distribution of the assets, who are subject to the jurisdiction.

The pronouncements of the Court of Appeal appear in the form of *obiter dicta*, but they are of far-reaching importance. It is therefore proposed to examine to what extent they are based on previous authority or on statute, and whether they are acceptable in principle untrammelled by authority.

II

In order to establish that jurisdiction to wind up a foreign unregistered company does not depend upon the existence of a place of business in England, Harman J. relied primarily on *Re Dendre Valley Railway & Canal Co.*[7] and *Re Union Bank of Calcutta.*[8] In his view *Re Tovarishestvo Manufactur Liudvig-Rabenek*[9] did not exclude jurisdiction in the absence of a place of business in England. *Re Lloyd Generale Italiano*[10] could be reconciled on the ground that the refusal to assume jurisdiction was based on the absence of assets in England rather than on the absence of a place of business there.

In the Court of Appeal the Master of the Rolls argued, in the first place, that the words of section 399 (5) of the Companies Act, 1948,[11] which provides—

> " The circumstances in which an unregistered company may be wound up are as follows:— (*a*) If the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs . . . "

are disjunctive, and not cumulative. Consequently, it was not a necessary condition for an English winding up that the foreign company must have carried on business in England.

In the second place he argued that section 400 of the Companies Act, 1948,[12] which establishes jurisdiction to wind up in circumstances where:

> " a company incorporated outside Great Britain, ceases to carry on business in Great Britain "

7 (1850) 19 L.J.Ch. 474.
8 (1850) 19 L.J.Ch. 388.
9 [1944] Ch. 404.
10 (1885) 29 Ch.D. 219.
11 Formerly Companies Act, 1929, s. 338 (1) (*d*).
12 Formerly Companies Act, 1929, s. 338 (2).

was only expository. It did not add special restrictions over and above the requirements of section 399 (5) (*a*) as understood by the Court of Appeal. The court conceded only that " some commercial subject matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction." [13]

III

1. Upon examination it appears that neither *Re Dendre Valley Ry. & Canal Co., ex p. Moss* [14] nor *Re Union Bank of Calcutta* [15] is relevant to the issue. The former case concerned a Belgian limited company (*société anonyme*), a great number of whose shareholders were in England, where the company had been floated in part, where there was also a board of directors and where a part of the assets were located. For the purposes of English law the English shareholders were members of an unlimited joint stock company. Wigram V.-C. referred to the company as " partly English and partly foreign " and continued [16] :

> " If the company were wholly English, would that contract exclude the operation of the winding-up Acts or prevent the exercise of the jurisdiction of this court? . . . A party of Englishmen may have a partnership confined to themselves for constructing a railroad in a foreign country. In such cases the *contract* may clearly be subject to the Winding-up Acts as part of the law of this country but the law which is to determine the rights of the parties may be the law of that country in which the railroad is to be constructed . . . the law of Belgium must be adverted to for the purpose of determining what the rights of the shareholders are. But that is not the only matter I have now to adjudicate upon. . . ."

Thus the question was not whether a foreign limited company was to be wound up, but an unlimited English joint stock company. This required the direct application of the Joint Stock Companies Winding-up Act, 1848.[17] Similar facts led to the decision in *Re Madrid and Valencia Ry.*[18] Here Knight Bruce V.-C. said : the company " . . . may . . . be treated as subject to English or at least not exclusively subject to Spanish law and . . . I think it proper, notwithstanding the connection of the undertaking with a

[13] Submission, and not necessarily presence, is sufficient to satisfy the requirement of jurisdiction conferred by special statute. See *Re Dulles' Settlement Trusts* [1950] 2 All E.R. 1013, at p. 1021, *per* Asquith L.J.
[14] (1850) 19 L.J.Ch. 474.
[15] (1850) 19 L.J.Ch. 388.
[16] At pp. 475–76 (my italics).
[17] 11 & 12 Vict. c. 45, s. 5 (7) and (8).
[18] (1849) 3 De G.M. & Sm. 127.

foreign country, to make the usual order for dissolving and winding up the company." Upon appeal, Lord Cottenham L.C. said[19]: "Though the principal works were to be done in Spain, yet there was an English company formed to assist in carrying out these matters. . . ."

The second case relied upon by Harman J. in the *Banque de Moscou Case* was *Re Union Bank of Calcutta*.[20] This involved a joint stock company established in 1839 in India carrying on business mainly in India, but also some business in England. A shareholder in England petitioned for a winding-up order. The court, exercising its discretion, refused to make the order, but the words of Knight Bruce V.-C. make it clear that he regarded himself as competent to make an order since some members of the partnership were in England. He said:

> "suits may be maintained in this country upon the subject of the transactions of the company, whether suits between members of the partnership or suits of a different description . . . the court has jurisdiction to proceed for the purpose of dissolving or winding-up, so far as it can be done in the absence from its jurisdiction of some members."

These cases show that before 1862 a foreign limited company could be wound up in England, if there were shareholders in England. For the purpose of English law the English and the foreign shareholders formed an unlimited English joint stock company. This aspect gives colour to the ready assumption of jurisdiction by English courts.

2. The basis of the jurisdiction to wind up foreign companies changed with the passing of the Companies Act, 1862. Not the presence of English shareholders but the fact that the foreign corporation has a place of business or carries on business in England became relevant. This change of emphasis was encouraged by two considerations. Firstly, section 199 of the Companies Act, 1862,[21] laid down these conditions for winding up English unregistered companies, but did not mention foreign companies. Secondly, before 1862 a foreign limited company with shareholders in England was treated as an English unlimited company.[22] Consequently, it was possible for counsel in *Re Commercial Bank of India*[23] to argue that "the words . . . in section 199 are wide

[19] (1850) 19 L.J.Ch. 260.
[20] (1850) 19 L.J.Ch. 388.
[21] See now s. 399 (1), (4) and (5) of the Companies Act, 1948.
[22] *Re Dendre Valley Ry.* v. *Canal Co., ex p. Moss* (1850) 19 L.J.Ch. 474; *Re Madrid and Valencia Ry.* (1849) 3 De G.M. & Sm. 388; *Re Union Bank of Calcutta* (1850) 19 L.J.Ch. 388. See above III (1).
[23] (1868) L.R. 6 Eq. 517, at p. 518.

enough to include a company such as this. A foreign company, having an agent and office in England is amenable to the jurisdiction of the courts of this country, and could be made bankrupt under 7 & 8 Vict. c. 111." In this case a company incorporated in India had amalgamated with another. The new company was being wound up in England; the old company was being wound up voluntarily in India. There were assets in England. In these circumstances Lord Romilly M.R. said: " . . . I have to make the order; if the company is not wound up here, these persons will not be able to get their money." [24]

The foundations of the future development emerge here : English courts have jurisdiction if the conditions of section 199 relating to English unregistered companies are fulfilled, *i.e.*, there must be a place of business in England. But where foreign companies are concerned this jurisdiction will only be exercised if assets are available in England.

On the other hand, the grant of corporate personality to English limited companies, accompanied by the recognition of the corporate status of foreign limited companies, created new doubts. It appeared difficult to justify the winding up of a foreign corporate entity in England, since it was clear that the English Companies Act did not operate abroad.[25] The answer was provided by Kay J. in *Re Matheson Brothers, Ltd.*[26] This was a creditor's petition for winding up a company registered in New Zealand while proceedings were pending in New Zealand. Most of the shareholders, creditors and assets were in England, where the company had a branch. Kay J. made the order and said :

> " . . . the court has jurisdiction to make a winding-up order upon a petition of this kind, otherwise there might be no means by which the creditors could obtain payment of their debts."

He referred to section 199 of the Act of 1862 and continued :

> " . . . it has a place of business in London where it has carried on business, contracted debts . . . and has assets. . . . It is argued that this is a company which cannot be ' dissolved ' and reference has been made to section 111 [27] . . . which provides that when the affairs of the company have been completely wound up, the court shall make an order that the company shall be dissolved from the date of such order, and the company shall be dissolved accordingly, and the contention is that

[24] At p. 519.

[25] *Bulkeley* v. *Schutz* (1871) L.R. 3 P.C. 764; *Bateman* v. *Service* (1881) 6 App. Cas. 386.

[26] (1884) 27 Ch.D. 225, at pp. 228, 229.

[27] Companies Act, 1862; compare Companies Act, 1948, s. 274 (1).

> no company is within the scope of this Act, unless the court has jurisdiction to dissolve it.
>
> "But this dissolution of a company is brought about by a separate order of the court, and it by no means follows that because the court has no power to dissolve a company that it has no power to make an order to wind it up and, as a matter of fact, wound up companies are very seldom dissolved. Section 199 . . . is large enough in its terms to include a company such as this. . . ."

Apart from its bearing upon the effect of an English winding-up order upon companies registered abroad, this decision is significant in another respect. Jurisdiction to wind up exists under the Act if the foreign company has a place of business in England, but in view of the limited purpose of securing the assets in England for the benefit of creditors in general, English courts will exercise this jurisdiction in their discretionary power, if assets are available in England.

In similar circumstances North J., in *Re Commercial Bank of South Australia*,[28] stressed both that the company had carried on considerable business in England and that it had a large number of creditors and assets there. But he regarded his jurisdiction as purely ancillary to any winding up in Australia and limited the powers of the liquidator to getting in the English assets and settling a list of the English creditors.

The statutory jurisdiction under section 199 of the Act of 1862, apart from the discretion vested in the court if no assets are available in England, was the subject of the decision in *Re Lloyd Generale Italiano*.[29] The company, registered in Italy, was being wound up voluntarily in Italy. It had no branch office or assets in England, but carried on business through agents. The company petitioned for a winding-up order in England. The reason for this petition was that the company was anxious to transfer funds to England in order to make part payments to creditors *pari passu*, and wished to avoid attachment of the money by individual creditors while in the hands of the agent. Pearson J. refused to make the order and said [30]:

> ". . . [the company] has carried on business here through . . . agents in the same way as foreign merchants often carry on business in this country by means of agents. The jurisdiction to wind up a foreign company is purely a statutory one

[28] (1886) 33 Ch.D. 174; see also *Re Mercantile Bank of Australia* [1892] 2 Ch. 204, *per* North J., at p. 208. *Re Jarvis Conklin Mortgage Co.* (1895) 11 T.L.R. 373 and *Re Australian Joint Stock Bank* (1897) 41 S.J. 469 are inconclusive.

[29] (1885) 29 Ch.D. 219.

[30] At p. 220.

> under the Companies Act. . . . The Act is confined to English companies and foreign companies carrying on business in England with, so to say, a residence of their own—a branch office in this country. . . . ."[31]

It is thus difficult to follow the Court of Appeal in *Banque des Marchands de Moscou* v. *Kindersley*[32] in holding that the absence of assets in England was the determining factor for refusing to make an order. It must be admitted that if the English court had been able to exercise jurisdiction it is likely that the order would have been refused nevertheless in the exercise of the court's discretion, seeing that no assets were available in England. But this discretion can only be exercised if the court has jurisdiction. In the opinion of Pearson J. jurisdiction was entirely regulated by statute, and the statute required a place of business.

IV

In view of the conflicting interpretation of the provisions of the Companies Acts which determine the jurisdiction to wind up foreign unregistered companies, it is appropriate to examine these provisions more closely.

The Joint Stock Companies Winding-up Act, 1848, s. 5 (7) and (8)[33] first laid down the material conditions for their winding up. This section is now reproduced in section 399 (5) (*a*) and (*b*) of the Act of 1948. It applied to all partnerships, associations or companies, corporate or unincorporate, covered by the Act (section 3). Apart from special provisions determining conflicting jurisdictions in England and Ireland (section 117), the general rules of jurisdiction applied (section 118).

The Companies Act, 1862, distinguishing between registered and unregistered companies, regulated certain aspects of the latter in Part VIII.[34] Section 199 (1), which is identical with section 399 (3) of the Act of 1948, for the first time introduced a special jurisdictional provision. Since winding up in England depended henceforth upon previous registration there, an unregistered company was attributed a notional place of registration at the place in England or Ireland where its principal place of business was situate. Unlike the Act of 1948,[35] the Act of 1862

[31] See also *Re Syria Ottoman Ry.* (1904) 20 T.L.R. 217, at p. 218, *per* Byrne J.
[32] [1951] 1 Ch. 112; [1950] 2 All E.R. 549.
[33] 11 & 12 Vict. c. 45, amended 12 & 13 Vict. c. 108; see the Act for the Registration, Incorporation and Regulation of the Joint Stock Companies, 1844, s. 66 (7 & 8 Vict. c. 110); Act for facilitating the Winding-up of the Affairs of Joint Stock Companies, etc., 1844, ss. 2, 24 (7 & 8 Vict. c. 111).
[34] Now Part IX of the Companies Act, 1948.
[35] s. 398.

omitted to define what are unregistered companies within the meaning of the Act, and did not extend expressly to foreign associations of any kind. Consequently, it remained necessary to rely on the old argument that a foreign limited company must be treated as an unlimited company for the purpose of winding up in England.[36]

The material conditions for winding up unregistered companies were contained in section 199 (3), which is identical with section 399 (5) (*a*)–(*c*) of the Act of 1948.[37] As a result of the combined operation of these subsections jurisdiction to wind up English unregistered companies and foreign limited or unlimited companies exists if a principal place of business is situate in England. If jurisdiction exists, *i.e.*, if there is a principal place of business in England, a company may be wound up, *inter alia*, if it has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.

The Companies (Consolidation) Act, 1908,[38] defined in section 267 the meaning of unregistered companies, but did not contain the equivalent of what is now section 398 (*c*) of the Act of 1948.[39] In other words, it permitted only by implication, but not expressly, the winding up of foreign partnerships, associations or companies on an equal footing with English unregistered companies. On the other hand, it introduced a new Part IX dealing generally with companies incorporated outside the United Kingdom which establish a place of business within the United Kingdom.[40] It is, however, impossible to obtain additional guidance as to the extent of jurisdiction to wind up foreign companies from the new provisions regulating the registration of foreign companies. Only the Companies Act, 1929, s. 337 (3),[41] stated expressly that the provisions concerning the jurisdiction [42] and grounds for winding up an unregistered company [43] extended also to foreign partnerships, associations and companies. The circle was thus closed.

[36] See above, note 22, and the cases cited there. And see *Russian and English Bank* v. *Baring Brothers* [1936] A.C. 405, at p. 424.

[37] It reproduces in subss. (*a*) and (*c*) the provisions of s. 5 (7) and (8) of the Act of 1848. See above, note 33. See also Companies Act, 1908, s. 268; Companies Act, 1929, s. 338 (1) (*d*).

[38] 8 Edw. 7, c. 69.

[39] See also s. 337 (3) of the Act of 1929.

[40] ss. 274 *et seq.* of the Act of 1908; Part X, ss. 406–414 of the Act of 1948.

[41] Incorporating Companies Act, 1928, s. 9 and Second Schedule; now Companies Act, 1948, s. 398 (*c*).

[42] *i.e.*, Companies Act, 1929, s. 338 (1) (*b*); now Companies Act, 1948, s. 399 (3).

[43] *i.e.*, Companies Act, 1929, s. 338 (1) (*a*); now Companies Act, 1948, s. 399 (5).

V

One conclusion emerges clearly: although it is not an exclusive material requirement for winding up a foreign company that it should have carried on business in England and ceased to have done so or is carrying on business only for the purpose of winding up,[44] it is an essential jurisdictional requirement that it should have a principal place of business in England.[45] The term "principal place of business" is open to a narrow or wide interpretation. Cohen J. in *Rabenek's Case*[46] preferred the latter, and there is no reason to oppose it, provided the purpose of the requirement of a place of business in England is not overlooked.[47] A place of business in England is the established criterion for assuming general jurisdiction over foreign companies,[48] and not only for the purpose of winding up.[49] Even within these well recognised limits, the exercise of winding-up jurisdiction would be dangerous if the company is still in being in the country where it has been registered, were it not for the practice outlined by Kay J. in *Re Matheson Brothers, Ltd.*[50] Different considerations, it may be argued, apply if the foreign company has been dissolved abroad, the more so if no provision is made in the foreign winding up for the collection of assets and the payments of creditors in England, or if the foreign liquidation, though recognised in England, cannot be enforced here on the ground that it violates public policy. Yet two reasons speak against an extension of jurisdiction by giving the term "place of business" a wide meaning. In the first place, no matter whether section 400 of the Act of 1948[51] expresses a rule pertaining to jurisdiction[52] or to the material requirements of winding up,[53] it requires that the foreign company has been carrying on business in Great Britain and has ceased to carry on business. Even if it is admitted with the Master of the Rolls,[54] that the conditions laid down in

[44] Companies Act, 1948, s. 399 (5) (*a*)–(*c*); Companies Act, 1929, s. 338 (1) (*d*).

[45] Companies Act, 1948, s. 398 (*c*) in conjunction with s. 399 (3).

[46] [1944] Ch. 404.

[47] See Companies (Winding-up) Rules, 1929, r. 28; 1949, r. 29; *Re Naamlooze Vennootschap Handelsmaatschappij Wokar* [1946] Ch. 98.

[48] *Carron Iron Co.* v. *Maclaren* (1852) 5 H.L.C. 416; *Newby* v. *Van Oppen* (1872) 7 Q.B. 293. Dicey, *Conflict of Laws* (6th ed., 1949), pp. 173–74 and the cases cited in notes 13, 14.

[49] Joint Stock Companies Winding-up Act, 1848, s. 118.

[50] (1884) 27 Ch.D. 225, at pp. 228, 229; Palmer, *Company Law* (19th ed., 1949), p. 415. For the converse principle that a dissolution abroad does not preclude the winding up in England of a foreign company see *Russian and English Bank* v. *Baring Brothers* [1936] A.C. 405.

[51] s. 338 (2) of the Act of 1929.

[52] s. 399 (3) of the Act of 1948; s. 338 (1) (*b*) of the Act of 1929.

[53] s. 399 (5) of the Act of 1948; s. 338 (1) (*d*) of the Act of 1929.

[54] [1951] 1 Ch. 112, at pp. 125, 128 *et seq.*; [1950] 2 All E.R. 549, at pp. 556, 558 *et seq.*

section 399 (5)[55] are disjunctive and that section 400[56] is purely expository, the fact remains that section 399 (3)[57] must be respected and that jurisdiction can only be exercised within the framework of this provision. Indeed it may be suggested that the reference to the case where a company incorporated outside Great Britain "which has been carrying on business in Great Britain ceases to carry on business in Great Britain," which is to be found for the first time in the Companies Act, 1928,[58] and figures today in section 400, was intended to preserve the limits of jurisdiction first laid down in section 199 of the Companies Act, 1862, and now contained in section 399 (3).[59]

In the second place, assuming that the jurisdiction to wind up foreign unregistered companies had not been defined by the Companies Acts, it would still appear uncertain whether the presence of assets in England coupled with the presence within the jurisdiction of persons claiming to participate in their distribution[60] should be regarded as sufficient to exercise this jurisdiction in the absence of any place of business in this country. As shown above, the presence of assets in England is a decisive factor for determining whether the court should exercise its discretion to make a winding-up order, once the existence of jurisdiction is established. But according to English notions of Private International Law the mere presence of assets and of claimants in England is insufficient to establish jurisdiction in an action against a defendant abroad and does not support a bankruptcy petition.[61] The question remains, however, whether a more extensive assumption of jurisdiction based merely on the presence of assets in England is perhaps appropriate for the purpose of winding up a foreign company which has been dissolved abroad in the special circumstances arising out of the Russian revolution. Practical needs seem to require that, in the absence of a normal liquidation in Russia and in view of the certainty that the claims of the Russian liquidator would not be enforced in England, the assets in England shall not remain untouchable in perpetuity, and that the claims both of creditors and of shareholders must be satisfied even if the company has or

[55] s. 338 (1) (*d*) of the Act of 1929.
[56] s. 338 (2) of the Act of 1929, see *Russian and English Bank* v. *Baring Brothers* [1936] A.C. 405.
[57] s. 338 (1) (*b*) of the Act of 1929.
[58] 18 & 19 Geo. 5, c. 45, s. 91.
[59] But see Sir Raymond Evershed M.R. [1951] 1 Ch. 112, at p. 131; [1950] 2 All E.R. 549, at p. 560. For another view see Halsbury, *Laws of England*, 5 (2nd rev. ed., 1950), p. 943 and note (*m*). Compare *Russian and English Bank* v. *Baring Brothers* [1936] A.C. 405, at p. 428.
[60] Sir Raymond Evershed M.R. [1951] 1 Ch. 112, at p. 126; [1950] 2 All E.R. 549, at p. 556.
[61] Bankruptcy Act, 1914, ss. 1 (2), 4.

had no place of business in England. It may be argued that if the shareholders take no action and if the claims of the creditors arise out of business transactions concluded outside the United Kingdom, the process of winding up in England is inappropriate, and that the property constitutes *bona vacantia*. Yet the process of winding up may finally lead to the same result [62] and offers the additional advantage that outstanding claims are settled as of right. In these circumstances the opinion of the Court of Appeal, expressed *obiter*, that jurisdiction to wind up foreign dissolved companies exists if there are assets and claimants in England, even if the company had no place of business in England, must be applauded, although it cannot be easily reconciled with the Companies Act. It should, however, be restricted to circumstances such as those of Russian companies which were dissolved abroad by a process other than an ordinary winding up and where service upon the company or its foreign liquidator is unnecessary because the former has ceased to exist and the latter is not recognised in England.

[62] Companies Act, 1948, s. 354.

THE EVIDENCE OF CO-PRISONERS

R. N. Gooderson

The purpose of this article is to consider the extent to which the sworn evidence of a prisoner is admissible for the prosecution against a co-prisoner jointly indicted and jointly tried with him, or for the defence either on behalf of or against such a co-prisoner. The subject falls readily into two periods, that before the passing of the Criminal Evidence Act, 1898,[1] and the period from 1898 to the present day.

(1) *The period up to 1898*

The attitude of the English criminal law to statements by the prisoner has varied from age to age. During the existence of the Court of Star Chamber, interrogation of the prisoner on oath by prosecuting counsel and by the court was a common practice, but the unpopular oath did not outlive the abolition of the court in 1641, and interrogation itself did not long survive the Revolution of 1688. The examination of the prisoner, on oath, and subject to cross-examination, was not reintroduced until the Act of 1898, and then at the option of the prisoner, as distinct from the inquisitorial procedure of the Court of Star Chamber. Between 1688 and 1898, the prisoner was, however, allowed to tell his own unsworn story, without being liable to cross-examination. This would consist not merely of statements of fact, but also, in a case of felony, of an address to the jury, because a prisoner in such a case was not allowed to make his full defence, including an address to the jury, by counsel until an Act of 1836,[2] though a practice had grown up nearly a century before of allowing counsel to cross-examine the prosecution witnesses.[3] The right of the prisoner to make an unsworn statement, even where defended by counsel, survived the Act of 1836, though counsel was not permitted to state facts of which he could lead no evidence, and similarly the prisoner was

[1] 61 & 62 Vict. c. 36.

[2] 6 & 7 Will. 4, c. 114, s. 1.

[3] Stephen, *History of the Criminal Law*, I, 424: *R.* v. *Barnard* (1758).
Attempts to cross-examine by prisoners were usually pitiable, though for the trial of a barrister, later a judge, indicted for committing a murder while on circuit, who successfully performed the difficult roles of cross-examiner, witness, and advocate, and also contrived to soothe an irritable judge, see *R.* v. *Cowper* (1699) 13 St.Tr. 1105.

expected to confine himself to questions of fact.[4] The prisoner can still make an unsworn statement since the Act of 1898.[5]

The rule that a prisoner could not be interrogated on oath would seem to involve the further rule that a prisoner could not give evidence for or against a co-prisoner, as this would of necessity subject him to cross-examination, in the course of which he might implicate himself. The evidence of a co-prisoner on oath was, however, clearly admissible and subject to cross-examination in the following cases:— (i) after a *nolle prosequi*; (ii) after a plea of guilty; (iii) after an acquittal; (iv) after severance of the trials.

(i) *After a nolle prosequi*

It is an old practice for the Crown to call a prisoner as a witness for the prosecution against a co-prisoner jointly indicted and jointly tried with him, after entering a *nolle prosequi* with regard to the desired witness: *Man* v. *Ward* (1741).[6] An illustration of the operation of the rule is provided by one of the Chartist trials: *R.* v. *O'Connor* (1843).[7] The Attorney-General there entered a *nolle prosequi* regarding one Cartledge, who had been jointly indicted with O'Connor and others, and was already in the witness-box as a prosecution witness against them. Counsel for the other prisoners objected to the entering of a *nolle prosequi* at so late a stage, and ultimately the trial judge, Rolfe B., as Lord Cranworth then was, directed the acquittal of Cartledge, before receiving his evidence for the Crown, to make assurance double sure. Presumably the question whether such a person could give evidence for the defence would be unlikely to arise, as the object of entering a *nolle prosequi* is usually to secure the evidence of the co-prisoner for the Crown, but there seems no reason in principle why a co-prisoner, regarding whom a *nolle prosequi* has been entered on some other ground,[8] should not be a competent defence witness.

(ii) *After a plea of guilty*

It has long been the law that, after a plea of guilty, a prisoner, jointly indicted and jointly tried, is a competent witness for the Crown against a co-prisoner, or for the co-prisoner himself: *R.* v. *George* (1841).[9] There Coltman J. allowed F. to call a co-prisoner G., who had pleaded guilty, but had not yet been sentenced, to

[4] Stephen, *op. cit.*, I, 440. *Russell on Crime*, 8th ed. (1923), 1836.
[5] S. 1 (*h*); *R.* v. *Pope* (1902) 18 T.L.R. 717.
[6] 2 Atk. 228, 229; 26 E.R. 541, 542.
[7] 4 St.Tr.(N.S.) 935, 1026–31.
[8] For other grounds on which a *nolle prosequi* may be entered, see *Archbold's Criminal Pleading, Evidence and Practice*, 32nd ed., 109.
[9] Car. & M. 111; 174 E.R. 432.

prove that F. was not present at the crime. There was, however, a rule that a person convicted of certain crimes, treason, felony, or *crimen falsi*,[10] was disqualified from testifying as a witness before any court. It was only the sentence, and not the mere verdict of guilty, that involved the disqualification: *R.* v. *Crosbie* (1695),[11] *Lee* v. *Gansel* (1774),[12] *R.* v. *Hinks* (*post*). The disqualification was removed by pardon, and an Act of 1828 provided that enduring the punishment should, in a case of felony not punishable with death, have the effect of a pardon, and should, in the case of a misdemeanour (except perjury or subornation of perjury), similarly restore the competency of the offender as a witness.[13] Thus where a co-prisoner had pleaded guilty to a crime involving disqualification, and was required as a witness for the Crown against a co-prisoner or on the latter's behalf, the practice was to respite judgment until after the self-confessed prisoner had testified, as in *R.* v. *George* (*ante*), or to impose upon him a nominal sentence of imprisonment *e.g.*, for one day, so that on the next day he should be competent to give evidence: *R.* v. *Lyons* (1840).[14] Of course if the offence admitted was not one involving disqualification, there was no objection to sentencing the co-prisoner before he gave evidence: *R.* v. *Fletcher* (1724),[15] where A and B were indicted for assault, and A submitted and was fined one shilling and paid the fine. B pleaded not guilty, and Lord Raymond C.J. held that B could call A as a witness.[16]

In 1843 was passed Lord Denman's Act,[17] which laid down that no person offered as a witness was to be excluded by reason of incapacity from crime or interest from giving evidence in any proceeding, civil or criminal, but that every such person should be admitted to give evidence on oath. There was a proviso that the Act should not render competent any party to any suit, action or proceeding.[18] During 1845 several cases were decided in which a prisoner, after a plea of guilty and before sentence, was admitted as a prosecution witness against a co-prisoner: *R.* v. *Drury and Benson*,[19] *R.* v. *King and Braddon*.[20] Counsel argued unsuccessfully that the co-prisoner was previously incompetent from interest,

[10] The extent of the term *crimen falsi* is nowhere laid down with precision, but see Wigmore, *Evidence*, Section 520, II, 612 (3rd ed.).
[11] 2 Salk. 689; 91 E.R. 584.
[12] 1 Cowp. 1, 3; 98 E.R. 935, 936.
[13] 9 Geo. 4, c. 32, ss. 3, 4.
[14] 9 C. & P. 555; 173 E.R. 953.
[15] 1 Stra. 635; 93 E.R. 746
[16] This seems to be the explanation of the competence of the co-prisoner after sentence in *Lyons* and *Fletcher*, though the report is silent on the point.
[17] 6 & 7 Vict. c. 85.
[18] Until Lord Brougham's Act, 1851 (*post*), the parties in a civil case were unable to testify.
[19] 1 Cox 228.
[20] 1 Cox 232.

and that, although the incapacity from infamy had been removed by the 1843 Act, the incapacity from interest remained as expressly excepted by the proviso. In *R.* v. *Hinks* (1845)[21] such a plea was reserved for the consideration of all the judges.[22] There W., who had pleaded guilty, was received as a Crown witness against H., his co-indictee. The court held that there was no objection to W.'s testimony at common law, and the statute had made no alteration in this respect.[23] Counsel for H. further argued that the evidence was inadmissible apart from the Act, because W. became infamous by the mere plea of guilty, but the court referred to *R.* v. *Crosbie* (*ante*), and Alderson B. accused counsel of " burning day-light " in raising such a contention after the universal practice of the judges.[24]

There were similar decisions that such evidence was admissible for a co-prisoner: *e.g.*, *R.* v. *Arundel* (1849).[25] There A. and S. were jointly indicted. A. pleaded guilty, and judgment was respited. S. wanted to call A. as his witness, but counsel for the Crown objected, relying on the proviso to Lord Denman's Act. This was a forlorn hope after the decision in *Hinks*, and Patteson J. expressly decided, what is implicit in *Hinks*, that the proviso applies only to civil proceedings.

After disqualification from infamy had been removed by the Act of 1843, a view appeared, not tenable prior to the Act, that it was advisable or even necessary to sentence a prisoner who had pleaded guilty before he was allowed to testify. In *R.* v. *Jackson* (1855)[26] Erle J. decided that a prisoner, who had pleaded guilty, must be sentenced before he became a competent witness for a co-prisoner. This view cannot stand with the decisions in *Hinks* (*ante*), to which he was a party, and *King and Braddon* (*ante*), in which he was consulted, the only difference being that in the two earlier cases the co-prisoner was called for the Crown, in *Jackson* for the defence. This opinion of Erle J. did, however, receive some support from a dictum of Cockburn C.J. in *Winsor* v. *R.* (1866), where he observed that a sentence was necessary so that the prisoner might testify with a mind free of all the corrupt influence, which the fear of impending punishment, and desire to obtain immunity at the expense of the other prisoner, might

[21] 1 Den. 84; 2 C. & K. 462; 169 E.R. 161; 10 J.P. 690; 1 Cox 289.

[22] According to 2 C. & K. 462. 466, fifteen judges delivered judgment, but according to 1 Den. 84, 89, only the ten judges who heard the argument.

[23] The nearest approach to a reported judgment is this summary in 1 Cox 289, *sub nom. R.* v. *Williams*.

[24] 10 J.P. 690, 691.

[25] 4 Cox 260.

[26] 6 Cox 525.

otherwise produce.[27] In the same case Blackburn and Mellor JJ. thought that these points affected the weight and not the admissibility of the evidence.[28] The latter is the correct view. It cannot be a rule of law that sentence must precede evidence, because, before the Act of 1843, no convicted felon could appear as a witness unless he had been pardoned or served his sentence, and the practice was to respite judgment until the evidence had been given: *George* (*ante*). Moreover Cockburn C.J. explains in *R.* v. *Payne* (1872) that in *Winsor* he spoke only of what was convenient,[29] and he was a party to *R.* v. *Gallagher* (1875)[30] in which F. was held to be a competent prosecution witness against his co-prisoner G. after F. had pleaded guilty, but had not been sentenced.

(iii) *After an acquittal*

A co-prisoner jointly indicted and jointly tried was an admissible witness after acquittal either for the prosecution: *R.* v. *Rowland* (1826),[31] *R.* v. *Owen* (1839),[32] *R.* v. *O'Donnell* (1857)[33]; or for a co-prisoner whose fate was still uncertain: *O'Donnell* (*obiter*). The same rule applied to a prisoner discharged after a successful plea to the indictment of misnomer: *Sherman* (1736),[34] where Lord Hardwicke C.J. held that such a discharged prisoner was a competent witness for a co-prisoner still under trial.

A difficult question that arose was whether the evidence of a prisoner who had been acquitted and testified for a second co-prisoner was evidence against a third co-prisoner. A similar situation could arise where a co-prisoner testified after a plea of guilty, but the leading case, *R.* v. *Burditt* (1855),[35] happens to have arisen after an acquittal. There A, B and C were jointly indicted. A was acquitted and gave evidence as a witness for B which incriminated C. The question for the determination of the Court for Crown Cases Reserved was whether C could cross-examine A. The court held that cross-examination was permissible, but the judgments are not clear whether the evidence of A was evidence against C. The question is of considerable importance as it affects the law even today. An observation by Parke B.[36] suggests that it was evidence against C: "Any evidence which

[27] L.R. 1 Q.B. 289, 312.
[28] L.R. 1 Q.B. 289, 320, 324.
[29] L.R. 1 C.C.R. 349, 354.
[30] 13 Cox 61; 39 J.P. 502; 32 L.T. 406.
[31] Lord Tenterden C.J., Ry. & Mo. 401; 171 E.R. 1063.
[32] Platt B., V. Williams J., 9 C. & P. 83.
[33] Irish Court for Crown Cases Reserved. 7 Cox 337.
[34] Cases t. Hardwicke 303; 95 E.R. 196.
[35] Dears. 431; 6 Cox 458; 24 L.J.M.C. 63. *Sub nom. Luck*, 24 L.T.(o.s.) 280; 3 W.R. 246; 1 Jur.(N.S.) 119; 19 J.P. 87; 3 C.L.R. 440.
[36] Reported only in 19 J.P. 87.

criminates the prisoner becomes evidence for the prosecution?" The question-mark is peculiar. It does not seem to be a question to counsel, as it is immediately followed by the judgment of Jervis C.J. The Chief Justice remarks that the evidence "became tacked, as it were, to the case for the prosecution." The words "as it were" hint at a fiction, but do not explain how far the fiction extends. Is the testimony merely deemed to be evidence for the prosecution for the purpose of permitting cross-examination or for all purposes? One report of the case suggests that the former view is the correct one: "C was entitled to treat the evidence as that for the prosecution."[37] Two subsequent opinions in civil cases suggest the latter view: *Parnell* v. *G. W. R.* (1876),[38] *Allen* v. *A.*[39] The view that the evidence is admissible for all purposes seems to be preferable, as once cross-examination is permitted there is no solid ground for excluding the evidence.

(iv) *After severance of the trials*

The three previous exceptions to the rule excluding the testimony of a co-prisoner jointly tried and indicted are all genuine exceptions. The exception now under discussion is *ex hypothesi* not an exception at all as the trials are not joint. Yet it was only established after twenty-six judges had considered the point in *Winsor* v. *R.* (1866).[40] There A and B were jointly indicted and tried for murder. They pleaded not guilty and the jury were discharged as they could not agree on a verdict. A was then tried alone, and the question was whether B had been rightly admitted as a Crown witness against A, without having been either acquitted or convicted. All the judges were unanimous that B was a competent witness against A, except for Cockburn C.J. whose doubts have already been noted (*ante*).[41]

On the similar question whether such a witness is competent for a co-prisoner, the only authority is a dictum of Cockburn C.J. in *R.* v. *Payne*[42] that he is competent.

There was a view that a prisoner was a competent witness for his fellow prisoner even without a severance of trials or a previous acquittal or plea of guilty. This was so held by Alderson B. in

[37] 3 C.L.R. 440, 441, *per* Jervis C.J.
[38] 34 L.T. 126, 127, *per* Blackburn J.
[39] [1894] P. 248, 253, *per* Lopes L.J.
[40] Four Queen's Bench judges: L.R. 1 Q.B. 289; 12 Jur.(N.S.) 91. Fifteen judges in the Court for Crown Cases Reserved: 10 Cox 276, 326. Seven judges in the Court of Exchequer Chamber: 12 Jur.(N.S.) 561; 14 L.T. 567.
[41] See note 27, *ante*.
[42] 12 Cox 118, 121. By this time he had changed his opinion from the position he adopted in *Winsor* (see L.R. 1 C.C.R. 349, 354).

R. v. *Stewart* (1845).[43] The Reporter of the case doubts this decision because of the proviso to Lord Denman's Act, but there is no weight in this objection in view of the express decision in *Arundel* (*ante*), and the implied decision in *Hinks* (*ante*) and *Drury* (1848),[44] that the proviso applied only to civil proceedings. The wording of Lord Brougham's Act, 1851,[45] lent some colour to this view held by Alderson B. Section 2 rendered the parties in "any suit, action or other proceeding, except as hereinafter mentioned, competent and compellable to give evidence." Section 3 provided that nothing should render any person in any criminal proceeding competent or compellable to give evidence for or against himself. The argument is that the parties are expressly made competent by section 2, and that section 3 does not prohibit a prisoner testifying for or against a co-prisoner. A number of puisne judges followed this view, including Mellor J.,[46] Pigott B.,[47] Lush J., and an Irish judge, Ball J., but ultimately the view was rejected by 16 judges in the Court for Crown Cases Reserved, including Mellor and Lush JJ., and Pigott B., in *R.* v. *Payne* (1872).[48] There C. had given evidence for P. before the committing magistrates on a poaching charge, but was later identified as one of the party of poachers and indicted along with P. P. desired to call C. at the joint trial, but the court held that C. was not a competent witness, because if C. appeared as a witness he would be cross-examined and it is a fundamental rule of English common law that a prisoner on trial should not be cross-examined. As for the argument that sections 2 and 3 of the 1851 Act had altered the law, section 2 was held to be confined to civil proceedings, the words "or other proceedings" being construed *ejusdem generis* with the words "suit, action" just as the similar words in the proviso to section 1 of the 1843 Act had been construed by Patteson J. in *Arundel* (*ante*).

Where the evidence of a co-prisoner was admitted for the prosecution, the practice had sprung up of requiring corroboration of the evidence, if the jury believed the witness to be an accomplice. The general rule requiring corroboration of accomplice evidence did not emerge until after 1775, and before *R.* v. *Stubbs* (1855)[49] the practice of the courts was not uniform. In *R.* v. *Sparks* (1858)[50] Hill J. went so far as to refuse to hear the evidence of a co-prisoner,

[43] 1 Cox 174.
[44] 3 C. & K. 190.
[45] 14 & 15 Vict. c. 99.
[46] In *R.* v. *Deeley*, 11 Cox 607.
[47] In *R.* v. *Payne and Allmann* (unreported).
[48] L.R. 1 C.C.R. 349; 41 L.J.M.C. 65; 12 Cox 118; 26 L.T. 41; 20 W.R. 390.
[49] Dears. 555.
[50] 1 F. & F. 388; 175 E.R. 776.

who had pleaded guilty, unless corroborative evidence was first led, as in case there was no such corroboration the time of the court would be wasted. He ascribes this practice to Parke B., and the Reporter refers to *R.* v. *Stubbs*. This practice is, however, contrary to the decision of the Court for Crown Cases Reserved in *Stubbs*, in which Parke B. delivered a judgment. The essence of that decision is that juries should, as a rule of practice, be warned not to convict on the uncorroborated evidence of accomplices, but should also be told that they are competent to convict if they please. The procedure advocated in *Sparks* would, however, prevent the jury from ever convicting on such evidence. In three earlier cases, the practice of refusing to hear the accomplice, until corroborative evidence had been produced, had been followed by Gurney B. in *Mellor* (1833), Patteson J. in *Saunders* (1842) and Wightman J. in *Salt* (1843).[51] *Stubbs' Case* no doubt involved some departure from the former practice. It is noteworthy the Wightman J. was also a party to *Stubbs*, which is a decision contrary to the procedure he followed in *Salt*. The important matter for present purposes is, however, to note that some warning was given regarding the evidence of co-prisoner accomplices.[52]

Thus, to sum up, at the time of the passing of the Criminal Evidence Act, 1898, the evidence of a co-prisoner was not admissible for the prosecution or the defence, unless one of the four exceptions applied. If an exception applied and such a witness appeared for the prosecution then the accomplice caution was customary. A co-prisoner A who appeared for the defence of another prisoner B and incriminated a third prisoner C could be cross-examined by C, but it was not clear whether the evidence of A was evidence against C. This point not having been determined, neither had the further question whether, if the evidence was admissible against C, the accomplice warning was required.

(2) *The period from* 1898 *to date*

Since 1898, the law as to the evidence of co-prisoners for the prosecution has not changed. They are still competent only in the four exceptional cases: *R.* v. *Grant* (1944).[53] There five defendants appeared before the examining justices on a charge of conspiracy. Three were called by the prosecution to give evidence against their co-defendants. The justices purported to commit all

[51] See *Russell on Crime*, 8th ed. (1923), 2130, note (*q*). These three cases are not necessarily cases of co-prisoner accomplices, but illustrate the practice at that time.

[52] See also Blackburn J. in *Winsor*: L.R. 1 Q.B. 289, 320, where he states that it is right to tell the jury to look at such evidence with great caution.

[53] 30 Cr.App.R. 99.

five for trial, but Birkett J. quashed the indictment. In *R.* v. *Sharrock* (1948),[54] Lewis J. reached the same conclusion, even though the co-defendants called by the prosecution, after taking the oath, refused to testify, on the ground that it is not competent to call as witnesses against co-defendants persons against whom proceedings are pending and still untried.

As to the evidence of co-prisoners for the defence, the following questions arise :—

(i) whether the evidence of a prisoner is admissible for a co-prisoner;

(ii) whether such evidence is admissible against a co-prisoner.

(i) *Evidence of a prisoner for a co-prisoner*

The courts seem to have followed a consistent policy of holding such evidence to be admissible. Since 1898, a previous acquittal or plea of guilty has not been requisite to render a co-prisoner competent for the defence. The Criminal Evidence Act, 1898, laid down in section 1 that "every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person."[55] In *R.* v. *Macdonnell* (1909)[56] M. and Y. and another were indicted for larceny. Y. offered to give evidence for M. and was allowed by the trial judge to testify. M. was convicted and his counsel argued before the Court of Criminal Appeal that this evidence should not have been admitted. The court refused to read into the section the words "on the prisoner's behalf," as to do so would be a serious disadvantage to a prisoner and upheld the conviction. Where co-prisoners put up a joint defence, one prisoner may adopt the sworn statement of the other as part of his defence, and himself keep out of the witness-box, as in *R.* v. *Field and Gray* (1919).[57] The judge may then comment on the absence of one of the prisoners from the witness-box, as Avory J. did in that case. Another possible situation is that one prisoner may go into the witness-box merely to testify for a co-prisoner, and not to exculpate himself, but it was held in *R.* v. *Rowland*[58] by the Court of Criminal Appeal that such a witness may be cross-examined by the Crown as to previous convictions.

[54] 32 Cr.App.R. 124; [1948] 1 All E.R. 145.

[55] The words "for the defence" should be compared with the Draft Criminal Code, 1879, which would have permitted such evidence "for himself."

[56] 2 Cr.App.R. 322; 73 J.P. 490; 25 T.L.R. 808; 53 S.J. 745.

[57] *The Times*, December 18, 1920. In the C.C.A., 15 Cr.App.R. 129

[58] [1910] 1 K.B. 458; 3 Cr.App.R. 277; 79 L.J.K.B. 327.

Where the prisoners put up separate but consistent defences, and do not intend to incriminate one another, it may happen that under the strain of cross-examination they do so inadvertently. The fact that their sworn evidence had that tendency is no ground for a plea that the trials should have been severed. In *R.* v. *Bywaters* (1922), where B. and Mrs. T. were on trial for the murder of T., the husband of the female prisoner, both the prisoners went into the witness-box. B.'s case was that he stabbed T. in self-defence, and Mrs. T. stated that she swooned when the struggle between B. and T. began. There had been a guilty correspondence between B. and Mrs. T., and no doubt in attempting to explain their letters in the witness-box they did make statements that to some extent inculpated one another. B. appealed to the Court of Criminal Appeal on the ground that Mrs. T. became a witness against him as the trial was joint. The court observed: "It is idle to suppose that a miscarriage of justice has taken place if a prisoner against whom there is overwhelming evidence suffers some further evidence because another prisoner goes into the witness-box. No doubt, where the defence of one accused is to incriminate another that is a good reason for not trying them together."[59]

(ii) *Evidence of a prisoner against a co-prisoner*

What is the position where the evidence of one prisoner is avowedly to incriminate another? This question had arisen in *R.* v. *Burditt* (*ante*), in 1855, and it was held that the evidence of a prisoner, who had already been acquitted, for co-prisoner A incriminating co-prisoner B was subject to cross-examination by co-prisoner B, but the court did not expressly decide whether it was evidence against B. The first important case after the Act of 1898 was *R.* v. *Hadwen* (1902).[60] Of two prisoners jointly indicted, each gave evidence on oath exculpating himself and inculpating the other. The trial judge, Ridley J., had refused to permit one prisoner to cross-examine the other, but reserved a case for the consideration of the Court for Crown Cases Reserved. It was admitted that the Crown could cross-examine. The court held that the co-prisoners could cross-examine one another, but there was a difference of opinion between Lord Alverstone C.J. and R. S. Wright J. as to the effect of the Act of 1898.[61] Lord

[59] 17 Cr.App.R. 66, 68. The last sentence has been confined in *Barnes* (1940) 27 Cr.App.R. 154, 165, to cases where it is an essential part of one prisoner's defence to attack another, and even in such a case the court has a discretion to allow a joint trial: *Grondowski* (1946) 31 Cr.App.R. 116.

[60] [1902] 1 K.B. 882; 71 L.J.K.B. 581; 86 L.T. 601; 18 T.L.R. 555; 50 W.R. 589; 66 J.P. 456; 20 Cox 206.

[61] One effect is of course that a plea of guilty or an acquittal is no longer necessary before the prisoner can be sworn.

Alverstone thought that the evidence of one prisoner was not evidence against a co-prisoner, but that cross-examination should nevertheless be permitted, because in some cases the judge's direction to the jury to disregard such evidence would not be an effective protection, and furthermore counsel for a co-prisoner would be better instructed and feel it fitting to cross-examine more strictly than prosecuting counsel. His Lordship also referred to the analogy of *Burditt's Case* (*ante*). Wright J. was, however, prepared to permit cross-examination only if the evidence of a prisoner was legally admissible to inculpate a co-prisoner. He concluded that this result had been achieved by s. 1 (*f*) (iii) of the Act of 1898, which permits evidence of bad character and previous convictions to be given where a person charged "has given evidence against any other person charged with the same offence." The remaining four judges all agreed with Lord Alverstone, so that the *ratio decidendi* is clearly to be found in his judgment, yet it has been persistently ignored by counsel and the courts, or cited for the opposite view.

There seem to be only two reported cases in which *Hadwen* has been cited in the English courts in a case where a prisoner had given evidence on his own behalf against a co-prisoner. In *R.* v. *Hunting and Ward* (1908), counsel for W. submitted before the Court of Criminal Appeal that the evidence of H. on his own behalf at the trial would not be admissible against W., his joint indictee, but Channell J. disagreed with him,[62] referring to *Hadwen*. In *R.* v. *Paul* (1920),[63] P., M. and G. were jointly indicted for robbery. G. pleaded guilty, but, not being defended by counsel and no doubt bewildered by the procedure, did so from the witness-box on oath, though he had nothing further to say for himself. Prosecuting counsel proceeded to cross-examine him, and elicited damaging evidence incriminating P. and M. Before the Court of Criminal Appeal, counsel for P. argued that G.'s sworn statement was not admissible to inculpate his client, but Avory J. stopped him to refer to *Hadwen* and Lord Reading C.J., in delivering the judgment of the court affirming the conviction, described the argument for P. as novel, unsupported by authority and contrary to the usual practice.

Thus in the two cases in which *Hadwen* has been cited in the English courts, it has been used to support the view that the evidence of a prisoner is admissible against his co-prisoner, whereas

[62] 1 Cr.App.R. 177, 178; 73 J.P. 12.
[63] [1920] 2 K.B. 183; 89 L.J.K.B. 801; 123 L.T. 336; 84 J.P. 144; 14 Cr.App.R. 155; 36 T.L.R. 418; 64 S.J. 447; 26 Cox 619.

in *Hadwen* this view was rejected by five judges, and accepted only by Wright J.

In *Paul*, Lord Reading described the argument for inadmissibility as contrary to the usual practice, and there is indeed evidence of such a practice in a series of *sub silentio* precedents, where counsel for the prisoner usually confines himself to a plea that the evidence of the co-prisoner is that of an accomplice and requires corroboration, and does not rely on the wider proposition that the evidence is absolutely inadmissible against his client. In some cases the conviction is quashed on the ground that the evidence is tainted and uncorroborated: *R.* v. *Ashdown* (1916),[64] *R.* v. *Power and Lewis* (1919).[65] Sometimes the Court of Criminal Appeal find that there was sufficient corroboration, as in *R.* v. *Smallman* (1914), a clear instance of an implied rejection of the majority view in *Hadwen*. L. and S. were jointly indicted for receiving. Both gave evidence on oath, and both were convicted. S. appealed, but his conviction was upheld, Lord Reading observing: "It is said further that . . . there was no evidence against S. That contention is quite untenable. L.'s evidence, if accepted, was the strongest evidence against S. It is true that L. was an accomplice, but there was abundant corroboration. . . ."[66] The oblivion into which *Hadwen* had sunk is indicated by the fact that Ridley J., the trial judge in *Hadwen*, was a member of the court in *Smallman*. Sometimes even the rule requiring corroboration seems to be ignored: *R.* v. *Scott* (1909),[67] where the cogent argument of defence counsel is rejected by the Court of Criminal Appeal in a four-line judgment. Lord Alverstone himself, who had stated in *Hadwen* that the evidence of a prisoner was inadmissible against a co-prisoner, is a party to at least two decisions of the Court of Criminal Appeal where even corroboration was held to be unnecessary: *R.* v. *Green* (1908), *R.* v. *Martin* (1910). In the latter case, J. and M. were jointly indicted and each gave sworn evidence inculpating the other. Both were convicted. In reply to the argument of counsel for M. that corroboration was required, Lord Alverstone remarked: "This is one of those cases where it is very difficult to apply the rule about accomplices. If J.'s story was true he was not an accomplice, and if M.'s story was true he was not an accomplice. The jury did not believe the story of either."[68] The conviction is affirmed, but the suggestion that the rule requiring

[64] 12 Cr.App.R. 34. Lord Reading C.J., Scrutton, Atkin JJ.
[65] [1919] 1 K.B. 572; 88 L.J.K.B. 593; 14 Cr.App.R. 17.
[66] 10 Cr.App.R. 1, 3.
[67] 2 Cr.App.R. 215.
[68] 5 Cr.App.R. 4, 6.

corroboration has no application in such a case seems open to objection. It is true that every co-prisoner is not an accomplice, for the jury may find him guiltless, and in every case the question whether a prisoner is an accomplice must be left to the jury, but surely if the jury does not believe the statements of co-prisoners who try to throw the blame on one another, and finds them both guilty, the co-prisoners are *ex hypothesi* accomplices, and the appellate court ought to satisfy itself that there was corroborative evidence, lest the jury should be thought to have rejected the evidence of such prisoner as untrue for the purpose of proving his innocence and yet accepted it as the sole evidence of guilt of the co-prisoner. The need for the court to be satisfied on this point is made clearer by *R.* v. *Green*. There A. and G. were jointly indicted, A. for stealing, G. for receiving. Both gave sworn evidence and both were convicted. Counsel for G. argued before the Court of Criminal Appeal that A. was an accomplice and that there was no corroboration of his evidence.[69] Darling J., in dismissing the appeal, remarked: "G. and A. both went into the witness-box. They gave very different accounts of the matter. The jury did not believe either of them. This gets rid of a great deal of the point that G. was convicted on the uncorroborated evidence of an accomplice."[70] The judge may merely mean that G. has convicted himself out of his own mouth, which would be unobjectionable, but the trial judge's direction as to A.'s evidence should have been examined carefully. A.'s defence was in substance that he was an innocent messenger, directed by X to take the goods to G., and that he handed them to G. G.'s defence was that A. took the goods to an upper room in G.'s premises without his (G.'s) knowledge. The jury reject A.'s defence, and also G.'s. They presumably accept A.'s evidence so far as he stated that he delivered the goods to G. personally, and reject his plea of innocence. A.'s evidence is therefore that of an accomplice and requires corroboration so far as G. is concerned. No doubt this was forthcoming from G.'s own statement, but if that is the meaning of the court it is submitted that it is expressed obscurely, and it is misleading to

[69] In *Phipson's Manual of Evidence* (1950) 7th ed., 212, it is said that the testimony of either thief or receiver against the other does not fall within the rule requiring corroboration of an accomplice. The same statement is in *Phipson on Evidence* (1942), 8th ed., 478, and *Haslam* (1786) 1 Lea.C.C. 418 is cited. *Haslam* does not support this proposition which is contrary to good sense and to the following authorities: *Robinson*, 4 F. & F. 43; *Pratt*, 4 F. & F. 315; *Mellor, Russell on Crime*, 8th ed., 2130; *Jacobs*, 1 Cr.App.R. 215; *Bowler*, 2 Cr.App.R. 168; *Powell*, 3 Cr.App.R. 1; *Mullins*, 5 Cr.App.R. 13; *Jennings*, 7 Cr.App.R. 242; *Norris*, 12 Cr.App.R. 156; *Bryant*, 13 Cr.App.R. 49; *Dixon*, 19 Cr.App.R. 36; *Reynolds*, 20 Cr.App.R. 125; *Medcraft*, 23 Cr.App.R. 116.

[70] 1 Cr.App.R. 124.

suggest that where the jury believe neither co-prisoner the accomplice warning is out of place.

It has been noted that the practice of admitting the evidence of a prisoner on his own behalf as evidence against a co-prisoner was common while Lord Alverstone was Chief Justice (despite his contrary judgment in *Hadwen*), and also under Lord Reading. It continued while Lord Hewart was Chief Justice. The evidence was admitted, counsel for the prisoner merely insisting on the corroboration warning, and this was usually required by the Court of Criminal Appeal. In *R.* v. *Heathfield* (1923)[71] and *R.* v. *Barrow* (1934),[72] convictions based on the evidence of a co-prisoner were quashed in the absence of any warning by the trial judge against convicting on the uncorroborated evidence of a co-prisoner accomplice, and in *R.* v. *Macdonald* (1928)[73] and *R.* v. *Martin, Ansell and Ross* (1934),[74] convictions were quashed where the trial judge had directed the jury erroneously that there was corroboration of the co-prisoner's evidence. In *R.* v. *Hooley* (1922), however, though counsel for the prisoner urged upon the Court of Criminal Appeal the need for corroboration,[75] the court ignored the point in the judgment.

R. v. *Hogan* (1922) is a decision that seems to be unfair to the prisoner. There had been conflicting rulings of the Court of Criminal Appeal as to whether if counsel for a prisoner submitted, at the close of the prosecution's case, that there was no evidence against his client to go to the jury, and the judge allowed the case to proceed, the deficiencies in the prosecution's case could be supplemented by the defence evidence. A "full" court of five judges in *R.* v. *Power and Lewis* settled the matter in favour of the prosecution. There counsel for P. submitted, at the close of the prosecution case, that there was no evidence against his client to go to the jury, the judge allowed the case to proceed, and counsel for P. cross-examined L., who was jointly indicted with P., and called P. as his own witness. It was held that the prosecution's case against P. could be supplemented by the defence evidence, and Darling J., in delivering the judgment, observed that "to have been quite safe P. should have taken no further part in the proceedings."[76] Two years later in *Hogan*, counsel for H. made a similar submission to the trial judge, that there was no case for the jury, but the judge allowed the case to proceed. Relying on the remarks

[71] 17 Cr.App.R. 80.
[72] 24 Cr.App.R. 141.
[73] 21 Cr.App.R. 33.
[74] 24 Cr.App.R. 177.
[75] 16 Cr.App.R. 171, 174.
[76] 14 Cr.App.R. 17.

of Darling J., counsel for H. took no further part in the proceedings. Co-prisoners gave evidence against H. but counsel for H. neither cross-examined them nor called his own client. The judge summed up to the effect that the evidence of the co-prisoners was evidence against H., and the jury convicted. Before the Court of Criminal Appeal, counsel for H. argued that the evidence of co-prisoners could not be used against him as he had taken no further part in the proceedings. Darling J. again delivered the judgment of the court, dismissing the appeal, one of the grounds being that H. did not go into the witness-box.[77] This seems an unfair ground on which to proceed, as counsel had deliberately kept his client out of the box, in reliance on the judge's observations in the previous appeal. Needless to remark, the case is also a complete rejection of the majority view in *Hadwen*, though, as usual, this case was not cited to the court.

Thus the English courts by a process of ignoring or misreading *Hadwen's Case* had evolved a practice of admitting the evidence of a prisoner against a co-prisoner. It is only in the Scottish decisions that a judicial discussion of the advantages and disadvantages of the respective views of Lord Alverstone and Wright J. is to be found. In *Hackston* v. *Millar* (1906),[78] the High Court of Justiciary, on facts similar to *Hadwen's Case*, quashed the conviction because the magistrate had refused to permit a prisoner to cross-examine a co-prisoner, who had given evidence against him. In a confused judgment, the Lord Justice-Clerk (Macdonald) professes to follow the view of Wright J., but in fact it is the view of Lord Alverstone that meets with his approval, though it is his regard for Wright J. that assists him in reaching this conclusion! In *Townsend* v. *Strathern* (1923)[79] the same question is again before the High Court of Justiciary. Counsel aver that the judgment in *Hackston's Case* is self-contradictory, and the court confess they have difficulty in understanding it. The Lord Justice-Clerk (Alness) indicates his preference for the view of Wright J., that the evidence of a prisoner is admissible against a co-prisoner, *i.e.*, the real view of the learned judge, not the one fathered on him by Macdonald L.J-C. The other two judges do not express a final opinion, but Lord Anderson hopes for a full bench ruling. In *Gemmell* v. *McFadyen* (1928),[80] the Lord Justice-General (Clyde) prefers the view of Lord Alverstone, that the evidence though not admissible is subject to cross-examination, but his opinion is *obiter*.

[77] 16 Cr.App.R. 182.
[78] 43 Sc.L.R. 395.
[79] 1923 J.C. 66.
[80] 1928 J.C. 5.

Finally in *Young* v. *H.M. Advocate* (1932),[81] the desire of Lord Anderson for a full bench is gratified, and he is a member of the court that decides in favour of the view of Wright J. The Lord Justice-General (Clyde), who has changed his mind since *Gemmell's Case*, rejects the view of Lord Alverstone on the ground *inter alia* that cross-examination on inadmissible evidence only makes confusion worse confounded.

To return to the law of England, despite the practice of the English courts, and the Scottish decision in *Young's Case*, the learned editor of *Phipson*[82] persisted in laying down as the law the Lord Alverstone view in *Hadwen*, and *Hackston* v. *Millar*, where Macdonald L.J.-C. accepts that view in the name of Wright J., a rose under another name apparently smelling sweeter. Even judicial authority for the view of Lord Alverstone is to be found as late as 1940; *R.* v. *Barnes and Richards*.[83] There five prisoners were jointly tried for murder. Two prisoners, who were ultimately acquitted, gave sworn evidence in their own defence, and Singleton J., the trial judge, summed up to the jury that the evidence of one prisoner was not evidence against a co-prisoner. This is the view of Lord Alverstone reappearing after long desuetude. A convicted co-prisoner appealed to the Court of Criminal Appeal on the ground that the warning against accepting uncorroborated accomplice evidence was not given. This argument is of course stretching the view of Lord Alverstone too far. It may conceivably be law that cross-examination on inadmissible evidence is permissible, lest the jury be privately impressed by their taste of forbidden fruit, but for the judge to direct the jury that co-prisoner evidence is inadmissible, and then to direct them that it requires corroboration would confuse a jury of Solomons. The question was not, however, disposed of on this short ground. Only one report[84] mentions that Singleton J. did direct the jury that the evidence was inadmissible. Counsel for the Crown argued on the broad ground that the necessity for the accomplice warning arose only where the accomplice testified for the prosecution. Lord Hewart C.J., in delivering judgment affirming the conviction, seemed to be impressed by this argument, and remarked: "One looks in vain for any case in which it has been decided that, where persons are tried together on the charge of being jointly concerned in the commission of a crime, and they elect to give evidence, and in so doing one of them happens incidentally to give a piece of

[81] 1932 J.C. 63.
[82] *Phipson on Evidence*, 8th ed. (1942), 451.
[83] 27 Cr.App.R. 154; 56 T.L.R. 379; [1940] 2 All E.R. 229; 84 S.J. 258.
[84] [1940] 2 All E.R. 229.

evidence which tells against another of the persons accused, it is requisite that the warning with regard to the evidence of accomplices should be given." [85] His Lordship then cited *Martin*, 5 Cr.App.R. 4 (*ante*). It is true that there is no need for the accomplice warning, where one prisoner adopts the defence of another expressly as in *Field and Gray* (*ante*), or implicitly as in *Bywaters* (*ante*), but the wide proposition that the accomplice warning applies only to prosecution witnesses is contrary to his Lordship's own decisions in the Court of Criminal Appeal in *Heathfield* (*ante*), *Macdonald* (*ante*), *Barrow* (*ante*), *Martin*, *Ansell and Ross* (*ante*).[86]

In *R.* v. *Garland* (1941),[87] the Court of Criminal Appeal returned to a clear statement of the rule that the evidence of one prisoner on his own behalf is evidence against a co-prisoner. The conviction was affirmed despite the absence of the accomplice warning, as there was clear and convincing evidence in corroboration. The court cited two cases for the proposition that the evidence is admissible, neither of which supports the proposition, for in *R.* v. *Lewis* (1937) [88] the evidence was that of a prisoner who had pleaded guilty and was then examined for the prosecution, and in *R.* v. *Davies* (1930) [89] the trials were not joint. In either of these cases the evidence would have been admissible even before the Act of 1898: *Hinks* (*ante*), *Winsor* (*ante*). But in *Garland* the trial was joint, the evidence objected to was given by the prisoner on his own behalf and he was still under trial. The view of Lord Alverstone and the majority in *Hadwen* was again overlooked.

In *R.* v. *Meredith* (1943), a third view appears, neither that of admissibility for all purposes, nor that of inadmissibility but liability to cross-examination, but the view that the evidence, though admissible, should be used sparingly. There co-prisoners had made statements against each other, both before trial in the absence of the others, and at the joint trial in the witness-box. After directing the jury that the statements before trial were not evidence against the absentees, the trial judge proceeded: "When the individual making a statement of that sort comes into the witness-box and gives evidence on oath, it is a different situation. What he says then does become evidence against the other person, but I endeavour in this class of case when there are a number of prisoners in the dock always to warn juries that so far as

[85] 27 Cr.App.R. 154, 166.
[86] Unfortunately the learned editors of *Archbold* cite the case as authority for the proposition that the rule of practice with regard to the corroboration of an accomplice applies only to witnesses called for the prosecution; 32nd ed. (1949), 463.
[87] 29 Cr.App.R. 46.
[88] 26 Cr.App.R. 10.
[89] 22 Cr.App.R. 33.

possible they should not use any evidence given by a person who is accused when he is in the witness-box against any one of his co-defendants. So far as his evidence is concerned, use it for the purpose of seeing whether he gives you an explanation which may be true or an explanation which leads you to disbelieve him and therefore to convict him, but try as far as possible not to use any one prisoner's evidence as evidence against one of his colleagues." [90] This direction to the jury was approved by Lord Caldecote C.J. in the Court of Criminal Appeal.

In *R.* v. *Rudd* (1948),[91] there was a return to the rule of admissibility for all purposes, subject to the warning about the need for corroboration. P., a joint indictee, had given evidence on his own behalf against R., the appellant. Humphreys J., in delivering the judgment of the Court of Criminal Appeal affirming the conviction, observed that the second ground of appeal was that the jury were not directed that the sworn evidence of P. should not be used against the applicant, in accordance with the decision in *Meredith*, and that the judge failed to direct them at all how they should regard it. His Lordship continued: "It is an astonishing thing for this court to be told that a learned judge was guilty of misdirection in failing to direct the jury that the sworn evidence given in the case was not evidence against one of the parties being tried. Ever since this court was established it has been the invariable rule to state the law in the same way—that, while a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case. That is the law as we have always understood it and there is ample authority to that effect, and most assuredly *Meredith* said nothing to the contrary." [92] The majority opinion in *Hadwen* was, as usual, overlooked, and it is remarkable that the only authority the court saw fit to cite out of "a whole series of cases" [93] was the case of *Garland* (*ante*), which escaped contemporaneous reporting, and is founded on two authorities which do not support it.

Though the majority view of Lord Alverstone and his four colleagues in *R.* v. *Hadwen* has never been judicially disapproved in England, it may be taken that it is no longer law. With respect, the right decision has been reached both in principle and on

[90] 29 Cr.App.R. 40, 43.
[91] 32 Cr.App.R. 138; 64 T.L.R. 240; 92 S.J. 206.
[92] 32 Cr.App.R. 138, 140.
[93] 32 Cr.App.R. 138, 142.

authority. As to principle, the view of Lord Alverstone tends, as Lord Clyde has it in *Young's Case* (*ante*), to make confusion worse confounded by permitting cross-examination on inadmissible evidence. It seems more in accordance with principle to acknowledge the admissibility of the evidence, subject to the warning about the need for corroboration. As to authority, it had been held as early as 1855 in *R.* v. *Burditt* (*ante*) that the evidence of a prisoner who, after acquittal, was called for a co-prisoner and incriminated another co-prisoner, was subject to cross-examination by the latter, and Blackburn J. in a later case, as has been seen, regarded this as a decision that the evidence was admissible against the co-prisoner. The only effect of the Criminal Evidence Act, 1898, is to render it unnecessary that there should be a previous acquittal before the prisoner is competent against a co-prisoner. It is, however, to be deplored that the decision as to the admissibility of such evidence in cases like *Rudd* has been reached without any consideration or even realisation of the other view. Sir Frederick Pollock, writing in 1899 when the Criminal Evidence Act, 1898, was in its infancy, expressed the hope that there would be absolute agreement among the judges, arrived at after careful consideration, as to the way in which the many questions left open by the Act were to be answered.[94] To say that this hope has not been realised is something of an understatement. Lord Alverstone has veered from the rule of exclusion subject to cross-examination that he laid down in *R.* v. *Hadwen*, to a rule of admissibility without the need of the accomplice warning in *R.* v. *Green* and *R.* v. *Martin*. Lord Reading has steered a clear course in favour of admissibility, subject to the accomplice warning, but has remained apparently unaware of the opposite view. Lord Hewart has at times favoured the rule of admissibility, subject to the accomplice warning, in cases such as *R.* v. *Heathfield*, but on another occasion he seems to have accepted the view of the trial judge that the evidence was inadmissible: *R.* v. *Barnes and Richards*. Lord Caldecote has given his blessing to a third view in *R.* v. *Meredith*. As to the textbooks, the learned editor of *Phipson on Evidence* has adhered to Lord Alverstone's view in *R.* v. *Hadwen*, without noticing the contrary trend of many of the decisions of the Court of Criminal Appeal.[95] The learned editors of *Archbold* have given the prisoner the worst of both worlds by citing *R.* v. *Rudd* for the proposition of admissibility, and *R.* v. *Barnes and Richards* for the so-called rule that

[94] 15 L.Q.R. 120.

[95] In *Phipson's Manual* (1950), 7th ed., 192, note 49, the view of Lord Alverstone has, however, disappeared in favour of *R.* v. *Rudd*.

the accomplice warning is required only where a co-prisoner is called for the prosecution.[96]

Pollock in his note made in 1899 also expressed the hope that every doubtful point arising under the 1898 Act would be construed in favour of the prisoner. Without necessarily going this length, it may be submitted that the decision in *R.* v. *Paul*[97] goes too far the other way. In *Paul* a co-prisoner pleads guilty on oath, without more, and is subjected to cross-examination by the Crown counsel to inculpate his fellow-prisoners. Lord Clyde expressed his doubts about this decision in *Young's Case*. Surely the court should exercise its discretion and forbid such cross-examination. As to corroboration, the jury should always be warned against convicting on the uncorroborated evidence of a co-prisoner if they find him to be an accomplice, and this rule should not be whittled away by spurious exceptions that seem to have been established in cases like *R.* v. *Green* and *R.* v. *Martin*.

Summary

A co-prisoner has never been a competent prosecution witness, save in four exceptional cases:— (i) after a *nolle prosequi*; (ii) after a plea of guilty; (iii) after an acquittal; (iv) after severance of the trials. Even in the four exceptional cases, it is the practice for the judge to warn the jury against convicting on the uncorroborated evidence of the co-prisoner, if they hold him to be an accomplice. As a defence witness, a prisoner was before the Act of 1898 competent for the defence of a co-prisoner only in the four exceptional cases, but it seems never to have been doubted since the Act that he is competent in all cases. Whether the evidence of the prisoner as a defence witness is evidence against a co-prisoner is a difficult question, but, although there are conflicting authorities, the better view, both in principle and upon authority, seems to be that today a prisoner is a competent defence witness against a co-prisoner in all cases,[98] but the jury should be given the accomplice warning, if they hold him to be an accomplice.

[96] *Archbold*, 32nd ed., 501, 463 (1949).

[97] *Ante*, pp. 219–220.

[98] Unless he merely makes an unsworn statement from the dock. In principle this should not be evidence against a co-prisoner, as not subject to cross-examination, and *semble* Avory J. so held in *R.* v. *Kennedy and Browne*, *The Times*, April 28, 1928. Counsel for the other prisoner can comment on the refusal to face cross-examination: *ibid.*, in the C.C.A., *The Times*, May 23, 1928.

THE CONCEPT OF A LAWYER'S JURISPRUDENCE

B. E. King

I

This article is intended to supplement another article, but it is hoped that it may be capable of standing on its own legs. The other article referred to is that entitled "The Concept of a Philosophical Jurisprudence," by Professor Michael Oakeshott, which appeared in the now extinct journal "Politica" in September and December 1938. The point in that article at which the present article may be appended occurs on p. 350 in the December number (Vol. III, No. 14), where Professor Oakeshott distinguishes two inseparable stages in the process of philosophical inquiry. "First, there is the identification, the mere designation of the subject of enquiry. If we are to determine the meaning of the concept 'law,' we must know how to apply the word 'law.' And this is to be learnt only by a critical examination of the ways in which the word is ordinarily used. But such an examination leaves us with merely the definition of a word, leaves us merely with the identification of a thing. We have that one thing clearly before us, but we have nothing else; we have the text, but its full meaning is still to seek." The exploration of this full meaning, of the "context" in which the thing law stands as "text," is for Professor Oakeshott the second stage in the inquiry which ends with the establishment of a philosophical concept of law—and he has offered guidance of the greatest value to all explorers. This article, however, will be concerned only with the method of obtaining the "text" from which that exploration may begin. It is suggested that it is a particular method of obtaining this "text" which constitutes the distinctive characteristic of a lawyer's jurisprudence.

It may be agreed that in any coherent and systematic thinking about law, we must have one thing, "law," and nothing else, clearly before us. Professor Oakeshott assumes that this can be ensured by a critical examination of the ways in which the word "law" is ordinarily used. But such a critical examination will leave us—unless the word "critical" is being used in a very special sense—not with the clear identification of a "thing," but rather with an acute awareness of the various, imprecise, and confused ways in which the term law is ordinarily applied. From the point

of view of a philosopher it may not matter (and indeed Professor Oakeshott expressly says that it does not matter) which of these ways is chosen as the starting point of his thought, since his thought works outwards to the exploration of a "context" which is common to all the ways in which the term is used—a context which is, in Professor Oakeshott's words, "the totality of experience," and to which the sky may literally be said to be the limit. But it does matter to the lawyer. For his thought is, to begin with, analytical. It works inwards, and his analysis is limited by the boundaries drawn by his starting point. The utility of his analysis must therefore depend upon the skill with which he selects and identifies, with the help of a clear defining concept, the "thing" to be analysed. And not only the utility of his analysis. For if the lawyer, in agreement with Professor Stone, regards extraversion as constituting a main province of his jurisprudence,[1] the utility of his outward looking cannot but be affected by the skill with which he chooses his vantage point. A lawyer's jurisprudence thus begins with the establishment of a descriptive concept of law which must at least clearly identify, on an empirical level, a single "thing" which is to be explained, in the first place, by internal analysis and the tracing of its more obvious and immediate external relations. It will not be disputed that to attain its final completion a lawyer's jurisprudence must pass over into a philosophical one. But the point is that the basic concept selected by the former is all important. It is a foundation which determines its superstructure. The philosophical concept to be attained by the latter has a different place and function. It is the crown or culmination of its edifice. It is the end of the argument, wherever one may happen to begin.

What is the criterion of the starting point which constitutes the distinctive characteristic of a lawyer's jurisprudence? The suggested answer is in principle simple. It is utility to lawyers. His "text" must certainly be clear, so that he has one thing, and nothing else, clearly before him. But it must also be the text that lawyers need—the one that is most useful for their distinctive purposes. It need not be the text of the sociologist, whose interests include the functioning of the most primitive of societies; nor that of the philosopher, who must correlate the texts of both lawyer and sociologist—and perhaps even those

[1] *The Province and Function of Law*, at p. 25. "Jurisprudence . . . is the lawyer's extraversion." The main, and serious, defect in Professor Stone's otherwise admirable work is that this view leads him to neglect the problem of defining law and to misconceive the role of logic in any—and particularly in Austin's—jurisprudence. See *infra*, note 5.

of the natural scientist and the theologian—in a context of the totality of experience.[2]

In his everyday practice a lawyer gets on very passably with vague, imprecise, and even mutually inconsistent notions of law. He has little practical difficulty in identifying the thing or things he is dealing with, and is seldom conscious of the need for, or utility of, refined general concepts. The awareness of the need, and the possible utility of its satisfaction, first arises in the minds of those concerned with the teaching of prospective lawyers, and particularly in the minds of those whose allotted task is to find a province for jurisprudence. About this province at least two things are clear. To begin with it must be expounded in books and in the lecture room, not demonstrated in practical action or in the forum of the courts. Jurisprudence can analyse the "thing" law only conceptually, through the medium of words and concepts, not practically, as in the analysis of chemical compounds or the dissection of frogs. And, secondly, the object of the analysis is not the revelation of particular detail as in the study of the separate subdivisions of law, but the discernment of more general considerations. Jurisprudence is purposeful thought about law, in search of generalities.

The instrument of conceptual analysis is logic, and the possibilities of its practical utility have been amply demonstrated by the applications found for pure mathematics in the practical applied sciences like physics, mechanics, and geodesy. For all practical purposes the logical manipulation of appropriate concepts may yield results foreshadowing and corresponding to the practical manipulation of empirical things. But logic can only reveal implications already inherent in the concepts it adopts as premises. It can extract no more than has already been put into them. This means that the fruitful or useful general concept is that whose structure or construction is such that it can be made to yield by logical manipulation the desired particulars. If the most highly general concept employed by lawyers is called the concept of law, it follows that the most fruitful concept to adopt

[2] Thus it is no part of a lawyer's jurisprudence to establish a general concept of law which is illustrated by all the various ways in which the term law has been applied. There may be no such concept discoverable. It is only directly concerned, at most, with the ways in which the term has been applied in legal theory. This term, "Legal Theory," has recently become a fashionable substitute for "Jurisprudence," perhaps because it furnishes a good excuse for the inclusion of theories of justice. But it furnishes no excuse for treating different theories about how the terms law and justice are or have been applied, or are best applied, as if they were merely different theories about the "nature" of the same immutable things, Law and Justice. Yet this confusion seems to persist.

will be that whose progressive logical analysis displays, as interrelated components, the less general and finally the more particular elements of the lawyer's professional experience. The initial task of a lawyer's jurisprudence is thus not to analyse a given "thing" law conceptually. No such "thing" is given precisely by current linguistic usage—or in any other way. It is rather to construct that concept of law whose analysis will best display the elements of, and the coherence within, the lawyer's practical experience. It is these elements which are given and which are the initial data of enquiry. The coherence of these elements is not, however, given. It has to be sought, though indeed it can hardly be found if not already there. More accurately, many different principles of coherence may be discovered, with the power of organising, more tightly or more loosely, a greater, or a lesser, number of the more, or less, important elements of the lawyer's experience. For the construction of the most fruitful concept of law that principle of organisation must be chosen which serves to display the maximum degree of coherence of the greatest number of the most important elements. Elements left out by any chosen principle of organisation may not, however, be disregarded. If they are of interest to a lawyer they must be dealt with in some way. It is merely a question of whether they can be most fruitfully dealt with as part of the structure of the "thing" law or as an appendix externally related to it.[3] In this way nothing relevant to the lawyer can be omitted from his Jurisprudence—it is only a question whether it can be most fruitfully dealt with in his introversion or in his extraversion—as part of the internal structure or of the external relations of law.

In all this there is nothing new. It is the method implicit in Austin's determination of the Province of Jurisprudence.[4] It is submitted that it is only Austin's application of his own method which was at fault. The Austinian concept of sovereignty did not in fact have the organising power which Austin claimed for it, for the simple reason that it has seldom, if ever, been exemplified in historical experience. Having no application in fact its conceptual analysis could not display or correspond with the coherence of actual facts. Its utility, apart from a premise for logical exercises, was at highest that of an "ideal type," useful for

[3] Thus Austin rather quaintly says that declaratory laws, repealing laws, and laws of imperfect obligation, though not laws properly so called, are "appropriate subjects of jurisprudence." Austin's *Jurisprudence*, 1885, at p. 214.

[4] It is also, rather more explicitly, the method adopted in Kelsen's *General Theory of Law and the State*, 1946.

interpreting and comparing actualities which did not precisely correspond to it. But it may be doubted whether, as is sometimes suggested, this is all that Austin intended his concept of law to be.[5]

II

It will now be attempted to construct a concept of law which is offered as a useful starting point for a lawyer's jurisprudence. To begin with the concept of law is clearly a class concept, and the members of the class to which the concept applies are actual legal systems. The relation of the concept of law to actual legal systems is like the relation of the concept of man to actual men. Thus it is true that the concept of law, like all class concepts, is abstract, or refers to an abstraction. But it is misleading to talk of law in the abstract or law in general. It is only the concept, or the characteristics it connotes, which may be designated as abstract or general. The concept applies to things which are always concrete.[6] Here the linguistic analogy with the concept of man breaks down. For whereas the concept of man applies solely to

[5] Three of the types of logical relation employed in Jurisprudence need to be carefully distinguished:—(a) the dependence of particular rules upon general principles from which they may be deduced; (b) the dependence of rules on sources, from which their authority is derived; (c) the dependence of "fundamental conceptions" on the concept of law, which may be made to yield them by analysis and other forms of logical manipulation.

Austin made use of all three types of relation and grossly exaggerated the role of the first in the English legal system. Kelsen correctly emphasises the use made of the second in all legal systems. It is the purpose of this article to stress the role of the third in Jurisprudence. Professor Stone fails to make clear the difference between these three types of logical relation, and it is submitted that this leads him to an inadequate appreciation of Austin. See also *infra*, note 11.

[6] *I.e.*, things whose mode of existence is in the empirically verifiable realm of being rather than in the transcendental realm of absolute values, validity, "ought," or obligation. This is at least true of the positivist and empirical tradition characteristic of Anglo-Saxon thought about law. But the reverse is the case wherever terms corresponding to the Anglo-Saxon "right" (*e.g.*, Recht, droit) are used in expressing the basic concept of Jurisprudence. Hence the long metaphysical, naturalist and idealistic tradition in continental thought. Kelsen's bold and ingenious attempt to bridge the gulf between the two realms (and two traditions of thought) can hardly be understood without appreciating the difficulties and problems presented by the traditional associations of the linguistic medium in which he worked. His compromise solution is to reduce, in theory, the realm of legal "validity" to mere logical dependence on a freely and subjectively accepted postulate—and to select, in practice, as his basic postulate that principle which will best allow him to interpret the vast majority of the facts of physical compulsion in an ordered society as being in conformity with legal norms. On these lines he seeks to assert the simultaneous "positivity" and "validity" of legal rules—but can only avoid identifying might and right (a dominant purpose he shares with Rousseau) by insisting on the "pure" or "non-moral" implication of his theory. But this involves him in paying merely verbal allegiance to the Greek and European tradition in which he seeks to remain—the tradition that the theory of law is concerned with values, "valid norms" or the realm of the "Sollen." A lawyer's jurisprudence sees the significance of this tradition in its effect on the actual contents of legal systems.

men, the concept of law does not apply solely to laws. Laws are but important elements in legal systems. All attempts to construe legal systems as mere collections of laws are unfruitful and unsatisfactory.[7] Legal systems, considered as wholes, are certainly complex. But they cannot conveniently be analysed without remainder into collections of rules of any kind. To do so is to regard, for instance, courts and the judicial process as mere appendices to law, forming no part of its internal structure. More fruitful is the approach which regards the thing law as identical with the thing "a legal system," and includes courts as among the most important elements in its structure. It is here proposed to include as elements, courts, judicial thought, legal norms, sources of legal norms (which will include judicial concepts of law), legal thought, and rules of law of three distinct types (substantive, procedural, and the rules of the judicial process). Further analysis of these rules will yield duties, liberties, powers, and any correlative notions; persons, things, titles, and sanctions. The analysis of legal norms will reveal the logical nature of the various types of concepts (legal concepts or concepts of the law)[8] found in legal norms. It may be said at this point that the term "legal norm" will be applied to what is commonly called a rule of law, and that the term "rule of law" will be given a specialised application.

Before proceeding to the definition of the "fundamental legal conceptions"[9] listed above it may be noted that it is quite immaterial whether the concept of a legal system is first defined and then made to yield, by analysis, the above conceptions, or whether the fundamental conceptions are first defined and the concept of law subsequently built up from these elements and their mutual relations. For clarity of exposition the method of synthesis seems to have advantages, and will here be adopted.[10] In any case it may be remarked that these elements constitute at least

[7] Among such attempts must be counted the present writer's suggestions in this journal, Vol. 10, No. 3, 1950, at p. 431.

[8] These are "unnecessary" or variable concepts depending on the content of actual legal systems as opposed to those "necessary" and unvarying concepts, the "fundamental legal conceptions" depending on the nature (or, more accurately the definition) of law. It is the distinction, stressed by Felix Somlo in his "Juristische Grundlehre," between concepts depending on "Rechtsinhalt" and those depending on "Rechtswesen."

[9] It will be noted that these conceptions will ultimately result from logical analysis and manipulation of the concept of law, and not, like Hohfeld's "fundamental conceptions" from what purports to be an empirical examination of legal material. Hohfeld's work is in fact based on an examination of the different meanings given to the word "right" in legal norms. It would be surprising if this could result in a scheme which was both accurate and neatly logical.

[10] Its results may be compared with those achieved by Professor Allen, who adopts a similar method, but employs totally different presuppositions. See "Jurisprudence, What and Why" in *Legal Duties*, at p. 19.

the initial, if not the complete, field of "general jurisprudence." The elements from which the concept of law is constructed must, by definition, be common to all legal systems. But any further "general" elements can be discovered only by empirical examination and comparison of actual systems which are, by definition, legal—and it may be doubted whether there are in fact any such further elements to be discovered.[11] Different systems of law may contain elements which are similar in a general way, as the English notions[12] of contract and ownership are generally similar to the Roman notions of contractus and dominium. But this general similarity does not constitute these notions topics of general jurisprudence, save as illustrations of specialised (and in fact vague and changing) forms of the truly general notion of a right or collection of rights. Any element of any actual legal system must be indeed capable of explanation in this way, *i.e.*, as a specialised form of one of the fundamental components of the general concept of law. And this holds not only for actual elements of actual legal systems, but for all possible elements of all possible systems—what Roguin would call "logical possibilities." For the object of all generalisation is economy of thought and effort in dealing with particulars, both actual and possible. And this is only achieved when a vast array of particulars can be simply and readily explained by displaying them as specialised examples of a few valid generalisations—whether these be in terms of abstract concepts of existents, general laws of recurrence, or general tendencies of development. It is in this sense that it is true to say that "Philosophy . . . aims at the construction of a system of general ideas that will explain all the events of human experience. Jurisprudence has a similar aim, but more circumscribed. It seeks to frame a system of ideas that will account for the events of the legal process."[13]

[11] Thus the field of general jurisprudence is limited to basic notions and distinctions, which may be the "principia" of Jurisprudence, but are not principles in the usual legal sense. Austin includes principles (*op. cit.*, at p. 1072) but does not actually give any examples of them. Some of his distinctions are not in fact basic, but merely possible distinctions dependent on principles (*e.g.*, *in rem* and *in personam* as applied to rights). So too, it follows, are some of his notions, which, inasmuch as they apply to facts involving sanctions, are merely disguised principles (*e.g.*, crime and tort). On the other hand Austin may have been wiser than he knew when he said that elements which may be esteemed necessary are such that "we cannot imagine coherently a system of law without conceiving them as constituent parts of it" (p. 1073). This is precisely because they are included, by definition, in the concept of law—and it is the justification for including them in it. The passage quoted above is misleadingly reproduced in *Stone*, *op. cit.*, at p. 68.

[12] These notions are, of course, disguised principles, to which they are logically equivalent. (See note 11, *supra*.) Thus to say that a legal system recognises the notion of contract is to say that it recognises the principle that certain agreements will be enforced.

[13] *Legal Philosophy from Plato to Hegel.* By Huntington Cairns, at p. 5.

III

Now, however law may be defined, it would seem that the events of the legal process must be empirically verifiable facts—and such facts would seem to be simply the functionings of a legal system. It appears to be fashionable to construct "functional definitions"—that is to define "things" in terms of modes of functioning—and indeed to regard "things" not as substances but processes, so that a thing that functions is identified with a process of functioning. If a "functional" definition of law is attempted—and it would seem that a legal system would lend itself readily to this sort of definition—it will therefore involve the conception of a legal system as a collection of related facts or events in continuous "functioning" process or motion. But present process depends on a past and anticipates a future. Thus this collection of facts will include present reference to events in the past (as when Statutes are consulted) or present anticipation of events in the future (as when a lawyer advises his client). Any attempt at a functional definition of law must take note not only of the present series of events which are among its constituent elements, but also of the intimate relations of those events to past events and to future possibilities and probabilities. If, as has been said, there is no Nature at a moment, this is also true of legal systems. There are no completely realised legal systems at a moment. A time dimension is inherent in their nature. Their identity and coherence can only be fully displayed over a continuous period of time. They are at any moment quite unintelligible without both reference to a past and anticipation of a future.

In the definition of law[14] to be attempted account will be taken of the above considerations in the following way. Legal norms will be distinguished from legal rules by the consideration that legal norms are expressly or implicitly recorded formulae (found *e.g.* in statutes, precedents and customs) which derive their meaning by reference to events in the past which constitute

[14] It may perhaps be helpful to anticipate a little and to say that the final definition will be an elaboration of the following formula:—
"Law or a legal system is any continuing state of affairs which is, and may be interpreted as, a functioning system, pattern or process centering round the reasonably predictable activities of a specified court or system of courts—and is such that its description, with a high degree of accuracy, may include an infinite number of empirically verifiable propositions relating possible fact situations to probable court reactions with respect to the authorisation of sanctions (rules of substantive law)." In the above definition the words "affairs . . . as" inclusive may be replaced by the words "the Universe, in the aspect it presents when seen as."

their origin; whereas legal rules are juristic formulations [15] which derive their meaning from the possible and probable future events which they anticipate. In other words legal rules will be considered as Mr. Justice Holmes considered them—as prophecies of what the courts will do; while legal norms will be defined as Mr. Justice Cardozo defined legal rules—*i.e.*, as the bases for such prophecies. Thus the same set of facts and events which in any present are the application of previously recorded legal norms will be regarded as being simultaneously the realisation or verification of previously formulated legal rules (or at any rate of legal rules which might have been previously formulated by a perspicacious jurist). So that the present functioning which is a legal system will continuously display, in judicial decisions, the coalescence of legal norms and legal rules. It will also, of course, display a great deal more. There will be the action of those agencies which are sources and the origination of legal norms. There will be the occurrence of acts and events which are titles, and the consequent origination of rights. There will be the performance, breach and enforcement of duties; the enjoyment of rights; the exercise of liberties; the wielding of powers. The application of sanctions. The emergence and extinction of persons. The adventures of things. The thinking of legal and of judicial thought. All these are facts and events which go to constitute the functionings of, or which are in themselves constituents of, or are, a legal system.

It may well be asked at this point whether there is anything at all which must be excluded from the functioning which is a legal system. And the answer is that there isn't. In the concept of law here put forward the concept of a court, or a system of courts, is, as it is in a lawyer's experience, central. But a component concept is the concept of legal thought. And this is a distinctive and comprehensive mode of experience which consists of thinking of everything in its relation to the probable reactions of a specified court.[16] Anything which may be thought of in that relation (and everything may be so thought of) becomes thereby a constituent

[15] Acknowledgment must be made to Kelsen for the borrowing of the notion of a "juristic formulation." But whereas Kelsen formulates the "legal rule" (or "rule of law") in propositions of the form "if situation of fact X then the court *ought* to apply sanction Y," the present write: adopts the form "if situation of fact X then the court *will probably authorise* the application of sanction Y." The grammatical form of a legal norm is of course the form in which it is recorded. Legal norms may, however, be reformulated in the logical form of legal rules, without changing the essential core of their meaning for the jurist.

[16] See the present writer's article in this journal, Vol. 2, No. 1, 1951, at p. 32, note 3. The definition of law given on p. 32 has now, however, been slightly modified. See *supra*, note 11.

of the legal system which includes that court.[17] And the thought of anything in that relation can be expressed in a proposition, in hypothetical or prophetical form, which is or which states a substantive legal rule belonging to that system. Thus whereas the legal norms recorded in any system are of a finite number, the number of legal rules is infinite. And this for two reasons. Legal norms may be recorded in general terms.[18] Legal rules are formulated in respect of particular situations. And legal norms, generally speaking, are needed to impose duties only, either directly or indirectly through the conferment of powers. But legal rules also express the totality of legal liberties, which are infinite in number. For legal liberties—to exist, or to act or abstain—are present whenever the probable reaction of courts to such existence or action is nil. Duties to act or abstain are only present when the probable reaction of the courts to the corresponding omission or action is the application of a sanction. And even in the most totalitarian of states the sphere of liberty constitutes an infinitely large addition to the sphere of duty in respect of possible human conduct.

It is obvious that a legal system thus conceived will stand in need of much more explanation than a system conceived simply in terms of a collection of legal norms. There is so much more to explain. But it has at least the merit of drawing attention to the fact that legal liberties, whether or not protected by rights of non-interference and corresponding duties, stand in need of explanation. They cannot simply be assumed. And if they are not understood they may be allowed to go by default. Yet surely it is the exercise of legal liberty, induced by the satisfaction it yields, which provides the dynamic which makes society and its legal system function at all—just as it is the performance and enforcement of duty which guarantees order, and the exercise of powers which secures the organisation of commercial and industrial, and indeed, political affairs and the continuity of family and other institutions. It is in this context that it may be seen that society depends more on rewards, the mainspring of free action, than on sanctions, though the function of legal norms with regard to

[17] Thus, for Professor Jerome Hall, facts are characterised as legal when they are "*viewed in relation to* a distinctive structure of thought (the legal rules)." (*Living Law of Democratic Society*, 1950, at p. 122). By legal rules Professor Hall means what the writer calls legal norms. But in the view here put forward facts become legal when they are *involved in* a distinctive structure of thought—legal thought—which relates possible facts to probable sanctions, and states its conclusions in propositions called legal rules.

[18] There seems to be little advantage in the pre-supposition that a norm, in order to have the character of law, *must* be in general terms. But there are very good reasons why the vast majority of legal norms should be so.

rewards is to refrain from interference rather than to prescribe. A society is scarcely conceivable where the only liberty is to perform duty and the only rewards are those to which there is legal right.

To trespass further on the field of explanation would be to enter the domain initially reserved to Professor Oakeshott—but two more points must be made. Where there is so much to explain attention must be directed to the most important points. A lawyer's jurisprudence must be selective. And if the internal structure of a legal system now appears to have devoured its external relations, it must be remembered that at least its components remain capable of external relations. Thus it is in such terms that legal norms must be explained.[19] The general explanation of legal rules is, of course, to be found simply in the presence or absence of the relevant legal norms, the current rules of the judicial process, and the foreseeable continuity of functioning which is the system to which they belong.

(To be continued.)

[19] Most theories of law are explanations of legal norms in terms of a single externally related factor deemed to be fundamental. But if they start from different definitions of legal norms they may not, of course, be explaining precisely the same things. See note 2, *supra*.

CONDITIONS IN FAVOUR OF THIRD PARTIES

T. C. Thomas

The purpose of this article is to consider the legal effects of a transfer of property by A to B subject to the performance by B of some obligation in favour of C, a third party to the transfer. The student of the law of contract is well familiar with the common law rule that no one who was not an original party to the contract is entitled to the benefit of that contract. But this rule creates hardship in particular cases and it has been shown [1] that, in the main, three methods have been evolved to evade those unfortunate results. First, the legislature has intervened and provided C, the third party, with statutory rights. Secondly, the doctrine of agency has been invoked whereby C may claim that he is the principal of B. Thirdly, but with varying success, the trust concept has been pressed into service whereby C has sometimes been able to show that he is a beneficiary.

The cases relevant to our present problem are not, however, concerned with contracts as such, but in considering them it is necessary to bear in mind the general rule stated above as well as the implications involved in the use of the trust as a method of circumventing the results of that rule. The cases to be discussed are almost all legacies or devises under a will, but the principles would appear to be applicable to gifts *inter vivos* as well. The problem may be stated thus. A, a testator, by his will, gives property to B and requires B to make some payment to, or perform some obligation in favour of, C. The primary question to be answered is whether or not C acquires any enforceable rights against B; and if he does, what is the nature of those rights. The nature of C's rights, if any, can only be determined by examining the nature of B's obligation and this, in turn, depends largely on the interpretation to be put on the words used by A. It is proposed, therefore, to consider the different interpretations to which the actual words used by A lend themselves, and in each case to examine the nature of B's obligation, if any, and the nature of C's rights, if any.

The words used by A (the transferor) in his endeavour to cast some duty upon B (the transferee) are infinitely various. The

[1] See Hanbury, *Modern Equity* (5th ed.), pp. 149–58; Cheshire and Fifoot, *Law of Contract* (2nd ed.), pp. 322–30.

transfer of the property may be accompanied by such phrases as " on condition," or " to the intent and purpose," or " in consideration," or " upon the terms," that the transferee shall make certain payments to, or do some other thing for, C, the third party. And though the question is primarily one of interpretation it would seem possible to suggest that the use of these and similar words may be construed to give rise to any one of five different results,[2] though combinations of two or more such results are possible. These possibilities are :—

I. *The words used by the transferor may be construed as indicating merely his motive for making the gift*

In such cases the words have no operative effect on the transferee who takes an absolute and unfettered interest in the property, and he is under no obligation of any kind to the third party. This interpretation is one which is familiar in the law of trusts, and the words used by the transferor are usually referred to as " precatory " words. In *Benson* v. *Whittam*,[3] the testator devised property " to my brother A.B. (to enable him to assist such of the children of my deceased brother F.B., as he, the said A.B., may find deserving of encouragement)." It was held that those words created no trust for the children of F.B., and that they merely expressed the reason for which the property was given. Again, in *Thorp* v. *Owen*,[4] the testator left everything to his wife for life and then said, " I give the above devise to my wife that she may support herself and her children according to her discretion and for that purpose." It was argued on behalf of the children that the widow was a trustee of the property for herself and all the children, either in equal shares or in such proportions as the court might determine, but it was held that the words merely expressed the testator's motive for the gift and that the widow took an absolute interest in the property for her own life and held no part of it in trust for the children. Sir James Wigram V.-C. said [5] : " The cases should be considered under two heads; first, those in which the court has read the will as giving an absolute interest to the legatees and as expressing also the testator's motive for the gift; and, secondly, those cases in which the court has read the will as declaring a trust upon the fund, or part of the fund, in the hands of the legatee. A legacy to A the better to enable him to pay his debts, expresses the motive

[2] Reference should be made to Theobald, *Law of Wills* (10th ed.), p. 428; Lewin, *Trusts* (15th ed.), pp. 87–9; Underhill, *Law of Trusts and Trustees* (10th ed.), pp. 37–41.
[3] (1831) 5 Sim. 22.
[4] (1843) 2 Ha. 607; compare *Re Booth* [1894] 2 Ch. 282.
[5] At p. 611.

for the testator's bounty, but certainly creates no trust which the creditors of A could enforce in this court; and again, a legacy to A, the better to enable him to maintain or educate and provide for his family, must, in the abstract, be subject to a like construction: it is a legacy to the individual with the motive only pointed out." A similar situation may arise where a gift *inter vivos* is made for a particular purpose. Thus in *Leche* v. *Kilmorey*,[6] a sum of money was paid by A to B for the purpose of purchasing C promotion in the army and it remained unapplied in the hands of B after the death of A. Later, C was compelled to leave the army on the ground of ill health, and he was held entitled to the money as against B and also as against the personal representatives of A, for the court was able to infer an intention that the donor intended C to have the money absolutely.

II. *The words used by the transferor may create a condition which binds the transferee*

This was frequently the interpretation put upon the words where the act required of the transferee was unconnected with giving rights to third parties; for example, a devise "on condition" that the devisee assumed the name and arms of the testator. But where the obligation on the transferee was in favour of a third party, there were at least two reasons against construing it as a common law condition. The first of these reasons arose from the rule[7] of the common law that no one could take advantage of the breach of a condition strictly so called except the grantor or his heirs, who might re-enter on breach; until re-entry, however, the interest of the devisee continued. So that, where the words imposed an obligation on the transferee to do something for a third person, the court was reluctant to interpret them as giving rise to a condition, for the result would be that, on breach, the grantor or his heir might re-enter and determine the estate of the transferee, and with it the interest intended for the third party.[8]

There was, of course, no harm in construing the words as imposing a condition where the third party and the heir at law were one and the same person, for in the latter capacity he might

[6] (1823) Turn. & R. 207.

[7] Ames, *Lectures on Legal History*, p. 236; Challis, *Law of Real Property* (3rd ed.), p. 81, states the rule as follows: "No one may take advantage of a condition except the person making it or his privies in right and representation, that is, (1) his heirs *quoad* estates descendible to them, (2) the executors or administrators *quoad* estates transmissible to them, and (3) the successors of corporations sole." This right has been made assignable by successive statutes, see Cheshire, *Modern Real Property* (6th ed.), pp. 519–20, and Law of Property Act, 1925, s. 4 (3).

[8] For conditions generally, see Bailey, *Law of Wills* (3rd ed.), pp. 128–38.

re-enter, subject to the general equitable principles which relieve against breaches of condition. In *Barnardiston* v. *Fane*,[9] a testator devised lands to R. " paying £1,000 to each " of the testator's two daughters. The daughters had received only £500 each and they, being the heirs at law, brought an action of ejectment to re-enter and recovered. The plaintiff (who claimed through R.) sought relief against this forfeiture for breach of condition and obtained a decree for that purpose on the terms that he paid the balance of £500 to each of the daughters.

But where the devisee and the heir at law are one and the same person, the court clearly preferred to treat the words as creating a trust rather than a condition, for the remedy in case of breach " would be nugatory." In *Anon.*,[10] land was devised to the heir at law " paying " a sum of money to a third party, and the report says " this would be a trust upon the land for raising the money " and not a condition because " no one could enter for the condition broken but the devisee himself." Furthermore, even where the words were construed as a condition, so that the only remedy was re-entry by the grantor or his heir, from a very early date there are suggestions that, even in this event, the interests of the third party ought to be protected. So, in the case last referred to, it was said " in case the devise were to a stranger ' paying ' £100 to A, that this makes a condition, and that the heir may enter for breach of it; but when he hath entered, he shall be a trustee so far as to secure the £100." This indirect method of protecting the third party was supported by Lord Hardwicke in *Wigg* v. *Wigg*,[11] where he took as an example: " A devises lands to B on condition to pay C a sum of money . . .; the heir at law shall re-enter and take advantage of the breach of condition, and yet in this court he shall be considered only as a trustee for the legatee." And in *Re Kirk*,[12] Fry J., after quoting Lord Hardwicke's example, says, " In other words, the heir will be bound if the court can see that the real intention of the testator was to create a trust."

From an equally early date, however, there is a realisation that the third party will be more directly protected if the transferee himself is made a trustee. In *Freak* v. *Lee*,[13] the testator devised lands to his nephew without words of limitation and provided that legacies to other persons amounting to £180 should be paid out of

[9] (1699) 2 Vern. 366.
[10] (1704) 2 Free. 278.
[11] (1739) 1 Atk. 382 at p. 383.
[12] (1882) 21 Ch.D. 431 at pp. 435–6.
[13] (1679) 2 Show.K.B. 36; see also *Wright* v. *Wilkin* (1862) 31 L.J.Q.B. 196, where the words " upon this express condition " were construed as imposing a trust on the devisee.

those lands, and it was held that the nephew took the lands in fee [14] on trust, and not upon condition, to pay the legacies. Scroggs C.J. observed,[15] "And much better for the legatees to have the lands liable upon a trust than upon a condition, and better to send them to equity against the devisee than against the heir. . . ."

The modern tendency, therefore, is against construing such words as imposing conditions; the more effective construction lies, either in constituting the transferee a trustee, or in imposing a charge on the property in the hands of the transferee, and this becomes apparent in the light of the second reason which made the common law condition an unsuitable vehicle to carry the rights of third parties. This reason arose from the rule that, where a condition subsequent, attached either to real or personal property, or where a condition precedent attached to personal property, became impossible of performance, the interest to which it was attached became absolute and unfettered in the hands of the transferee.[16] So, in *Re Frame*,[17] the testator bequeathed personal property to Mrs. T. "on condition that she adopts my daughter A. E., and also gives to my daughters J. E., and M. A. E. £5 each, and the like sum to my son Alex. E." Mrs. T. applied for an adoption order, but it was opposed by the daughter A. E. and the order was refused. It was argued on behalf of Mrs. T. that the gift to her was subject to a condition subsequent which had become impossible of performance and that she was therefore entitled to the property beneficially. It was held, however, that the words used by the testator created a trust binding on Mrs. T. The fact that Mrs. T. was obliged to do something in favour of third persons was taken as strong evidence against construing the words as imposing a condition. Simonds J. said [18]: " . . . the word 'condition' is not used in its strict legal sense. It is a gift to Mrs. T. on condition, in the sense of on the terms or on trust that she does certain things, and that, I think, becomes clearer when it is realised that the condition relates not only to the adoption of one daughter, but to the payment of certain sums to other daughters."

In *Re Kirk*,[19] the words were construed as creating a charge on the property rather than as imposing a condition. The testator devised freehold land to his son, R., "upon the express condition"

[14] The effect of a devise of lands without words of limitation followed by the imposition of some obligation on the devisee, is discussed below.
[15] At p. 41.
[16] See Bailey, *Law of Wills*, pp. 130–3.
[17] [1939] Ch. 700.
[18] At p. 703.
[19] (1882) 21 Ch.D. 431.

that the son should, within three months of the testator's death, relinquish his claim to a debt of £3,400 owed by the testator to the son. And the testator expressly directed that this debt was not to be paid out of his residuary estate. The son died before the testator and without issue, and at the time of the testator's death the debt was still owing. The devise to the son lapsed, of course, but the question remained as to what property was liable to discharge this debt. Now, if it had been construed as a condition, the condition became void for impossibility on the death of the son R., and the estate thereby became freed of the obligation to discharge the debt. It was held, however, that the words used by the testator created a charge on the land; it was, in effect, an indirect gift of £3,400 to the persons entitled to the residuary estate, for it operated to exempt that property from payment of the debt for which it would otherwise have been liable.

One further point may be made in relation to gifts upon a strict condition. It seems that, so long as the transferee observes the condition, the property given vests in him absolutely. This situation will have to be contrasted with the position which obtains where the transfer is made to a trustee and the trusts do not exhaust the trust property; for in that case, in certain circumstances, the trustee is not entitled to retain the balance beneficially. *Att.-Gen.* v. *The Cordwainers' Company*,[20] is an illustration of a gift upon condition. The testator in 1547 devised to the company "my House called the Sign of the Falcon for the only interest, use and performation of this my will," that they should pay certain annuities (amounting to about £8 in all) to the testator's brother and widow, and make certain small payments for charitable purposes. The Company duly paid the annuities and the sums for charitable purposes, but the rents of the land devised had increased from £12 in 1547 to £358 in 1833. The question arose as to who was entitled to this surplus, and the Company were held entitled. Sir John Leach M.R. said[21]: "The estate is absolutely given to (the Company) not upon trust. . . . It is rather a gift upon condition. . . . They are to take the estate upon condition that they perform the duties which are imposed upon them." So also in *Jack* v. *Burnett*,[22] a donor by deed granted certain lands to the Principal and members of King's College, Aberdeen, "upon the conditions" that they should admit three bursars to be nominated by the donor and his family, and the penalty for breach of the

[20] (1833) 3 My. & K. 534; compare *Att.-Gen.* v. *Wax Chandlers' Co.* (1873) L.R 6 H.L. 1.

[21] At p. 542.

[22] (1846) 12 Cl. & F. 812; see especially *per* Lord Campbell at p. 831.

condition was forfeiture. It was held that this was a grant upon condition and not a mere trust, so that, after satisfying the conditions, the College was entitled to retain any surplus arising from the lands given.

III. *The words used by the transferor may create a charge on the property in the hands of the transferee*

It has already been seen that the courts prefer to construe an obligation imposed on the transferee in favour of third parties as creating a charge on the property or as constituting the transferee a trustee. As was said by Chitty J. in *Re Oliver*,[23] "Now there is a well known rule of construction that a devise upon condition that the devisee makes certain payments . . . will, as a general rule, be construed as a trust and not as a condition, because if construed as a condition, the only person who takes advantage of the condition . . . is the testator's own heir. . . . It was to get over that objection that it has been said that generally the right construction is to hold that the devise creates a trust and not a condition. It has been termed a trust without any particular regard to the language, a legal effect being given so as to enable the person entitled to get the payments. But it is plain, for ordinary purposes, that the effect of the devise is to create a charge and not a trust. . . ." Though both methods give the third party a right to receive payment, it is suggested that there are a number of reasons why the two modes should be kept separate, for the extent and nature of the rights, and the remedies,[24] of the third party differ according to which of these two methods is adopted.[25] First, it would seem that, whereas a trustee stands in a fiduciary relationship to his beneficiary, a transferee holding property subject to a mere charge does not owe the same duties towards the chargee. *Re Oliver* [23] illustrates this. There the testator devised real estate to his nephew "he also paying thereout" certain sums to persons named by the testator, within six months of the death of the testator's sister. After the testator's death, the nephew went into occupation of the lands, but later, in order to pay the sums due to the third parties, the lands were sold under an order of the court.

[23] (1890) 62 L.T. 533 at p. 534.

[24] For example, the remedy of a mere chargee is sale with the assistance of the court; see *per* Lord Hatherley in *Tennant* v. *Trenchard* (1869) L.R. 4 Ch. 537 at p. 542.

[25] The *American Restatement of the Law of Trusts* (Vol. 1), § 10, makes this distinction as follows: "If the transferor shows an intention to impose a duty on the transferee to deal with the property for the benefit of a third person, and to give to the third person a beneficial interest therein, a trust is created: but if he shows an intention not to impose such a duty on the transferee, but to give to the transferee the beneficial interest therein and to give a security interest to the third person, an equitable charge is created."

The question arose as to whether the nephew had to account for an occupation rent in respect of his possession of the lands between the death of the testator and the sale of the lands—an obligation to which he would be subject if he was a trustee and the lands trust property. It was held that he was not a trustee for the third parties, that their interests were mere charges on the estate and that the nephew was therefore not liable to account for rents and profits.

Secondly, once the transferee has discharged the obligation in favour of the third party, he is entitled to retain the property transferred (or so much of it as remains) beneficially. On the other hand, where property is transferred on trusts which do not exhaust the trust property, as a general rule the trustee holds the surplus on a resulting trust for the settlor unless there is evidence that the settlor intended the trustee to retain that surplus beneficially.

Thirdly, the distinction was of importance when it became necessary to decide whether the rights of the third party were barred by lapse of time. Before 1833 [26] no Statute of Limitations barred the right to recover a sum of money charged on land, so that in the early cases a charge is often termed a trust. After 1833, the right to recover a sum of money charged on land was limited to twelve years; but it was not until 1888 [27] that trustees were given a measure of statutory protection. In many of the cases between these two dates, therefore, the third party sought to establish that the transferee was holding as an express trustee and so was perpetually liable; normally, however, the claim of the third party was regarded as a mere charge on land and so barred after twelve years.[28] And though trustees may now plead lapse of time in certain circumstances, their position has not been entirely assimilated to that of a transferee holding property subject to a charge in favour of a third party.[29]

[26] Real Property Limitation Act, 1833, s. 40; see now Limitation Act, 1939, s. 18 (1).

[27] Trustee Act, 1888, s. 8.

[28] See, for example, *Hodge* v. *Churchward* (1847) 16 Sim. 71; *Cunningham* v. *Foot* (1878) 3 App.Cas. 974.

[29] A claim in respect of a capital sum charged on real or personal property is now barred after 12 years (Limitation Act, 1939, s. 18 (1)); as to an annuity (being a "rentcharge") charged on land, only six years' arrears are recoverable (*ibid.*, s. 17); but a claim to an annuity charged on personal property appears not to be subject to any statutory bar. See Preston and Newsom, *Limitation of Actions*, p. 156.

As to trustees, an action by a beneficiary to recover trust property or in respect of any breach of trust, shall not be brought after the expiration of six years except (a) where the trustee has been guilty of fraud, or (b) where the beneficiary is seeking to recover from the trustee the trust property or its proceeds which are either in the hands of the trustee or have previously been received by him and converted to his own use.

In some other respects, a trustee and a transferee holding property subject to a charge are under somewhat similar obligations. For example, if the trust property is insufficient to satisfy the claims of all the declared trusts, the trustee is not under an obligation to meet these out of his own pocket. *Re Cowley* [30] shows that a person holding property subject to a mere charge is similarly immune. There the testator bequeathed all his interest in a number of leasehold farms and in the stock in trade connected therewith to his son "subject nevertheless to the payment of all his debts funeral and testamentary expenses." The son entered into possession of the farms and received the profits therefrom, but three years after the testator's death he discovered that the debts of the testator greatly exceeded the value of the bequest. Kay J. held that the son was not obliged personally to discharge these debts saying,[31] "I take the words only as amounting to a charge . . . I think that the son must be deemed to have elected to accept the legacies, subject to the payment of the debts, . . . but he is not personally liable to pay such debts."

Again, the interests of the beneficiary under a trust and those of a chargee are both equitable, the importance of which is seen where the transferee disposes of the property to a bona fide purchaser for value. In *Parker* v. *Judkin*,[32] the testator appointed his sons G. and S. his executors and devised certain business premises to them "conditional on" their paying an annuity of £300 to the testator's wife. After the testator's death, the sons entered into possession of the business but later sold that property to a company who bought subject to the annuity which was mentioned in the sale agreement. The conveyance to the company, however, contained no reference to the annuity. The company paid the annuity for some years but later sold the premises in question to the defendant J., the conveyance containing no reference to the annuity and the abstract of title not including the sale agreement between the sons and the company. The company having ceased to pay the annuity, the widow sought a declaration that her annuity was a charge on the premises acquired by J., and also on the company's present

[30] (1885) 53 L.T. 494; see also *Jillard* v. *Edgar* (1849) 3 De G. & Sm. 502.

[31] At p. 495.

[32] [1931] 1 Ch. 475. So also in *Wigg* v. *Wigg* (1739) 1 Atk. 382, the testator devised lands to his second son T. "upon condition" that he made certain payments to his own children, with a clause of entry for breach. T. died in the testator's lifetime, and the testator's heir entered and sold the land to a purchaser for value. It was held that the words imposed a charge on the property and did not create a condition (which would have failed by reason of the devise lapsing) and that the land in the hands of the purchaser was bound by the charge because "he had notice, for though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one transaction," *per* Lord Hardwicke.

and future property and assets. It was held, (i) that the annuity was a charge on the property left to G. and S.; (ii) that the premises acquired by the company from G. and S. were subject to the charge and this now bound the company and its assets; but, (iii) J. was in the position of a bona fide purchaser for value, and the widow's claim against him failed.[33]

IV. *The words used by the transferor may constitute the transferee a trustee for the third party*

This is probably the most effective method of securing the interests of the third party, and the obligations of the transferee and the rights of the third party will rest squarely on the established relationship of trustee and beneficiary. And although a transferor would be advised to use such unambiguous and mandatory words as "on trust" where he intends such a relationship to arise, trusts (like conditions) can be imposed by any language which is clear enough to show an intention to impose them.[34] So, even the words "on condition" attached to a devise have sometimes been held sufficient to make the transferee a trustee. In *Smith* v. *Alterly*,[35] the report states, "A deviseth his lands to his wife, and after to his eldest son *with condition* that if his wife should be with child, £80 should be paid by his eldest son to the child after the mother's death; the wife had a child and (there-) after the eldest son conveys away the land to a purchaser; and on proof that the purchaser had notice of the will, a decree was for the daughter (the child) for her money devised, and declared it was a trust to go with the lands." So also in *Woods* v. *Woods*,[36] where the testator devised certain estates to his wife to sell and pay creditors "and if sold, all overflush to my wife towards her support and her family, if any there be," it was held that, if after sale there was a surplus, the widow must hold it on trust for the children.

Although the interests of the third party (as a beneficiary) are clear and precise in such cases, there is a difficulty concerning the disposition of any property left in the hands of the transferee after

[33] It would seem that where land is devised charged with the payment of a sum of money in favour of a third party, the land may become settled land in virtue of the Settled Land Act, 1925, s. 1 (1) (v), which provides, "Any deed, will . . . or other instrument . . . under which . . . any land . . . stands for the time being charged . . . with the payment of any capital, annual or periodical sums for the . . . advancement, maintenance or otherwise for the benefit of any persons . . . ; creates or is for the purposes of this Act a settlement": *Re Austen* [1929] 2 Ch. 155. And since such an equitable charge would "arise . . . under a settlement" within the Land Charges Act, 1925, s. 10 (1) Class C (iii), it would not be registrable. The doctrine of notice would therefore retain some of its vitality in this case.

[34] *Per* Lindley L.J. in *Re Williams* [1897] 2 Ch. 12 at p. 18.

[35] (1648) 2 Free. 136.

[36] (1836) 1 Myl. & Cr. 401.

he has satisfied the claims of the beneficiary. The transferee may be placed in one of two positions; he may be a trustee and also a beneficiary, or, on the other hand, he may be a trustee simply and solely.[37] The classic statement of this distinction appears in the judgment of Lord Eldon L.C., in *King* v. *Denison*[38] : " If I give to A and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose : the latter is a devise for a particular purpose with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir." As an example where the transferee is treated as having received a beneficial interest in the property so that, after performing the obligation owing to the beneficiary, the transferee would be entitled to any surplus, *Re Foord*[39] may be cited. There the testator provided as follows: " All my effects . . . I leave absolutely to my sister M.J. on trust to pay my wife per annum (£300)." The property was more than sufficient to provide for the wife's annuity and the sister was held entitled to the balance beneficially as against the testator's next-of-kin, Sargant J. observing[40] that " the court is prepared to hold that there is a beneficial gift to the first taker on slight expressions and indications of intention."

With *Re Foord*[39] may be compared the recent case of *Re Rees*[41] where the court interpreted almost identical words in the second sense indicated by Lord Eldon. In *Re Rees*[41] the testator devised and bequeathed all his property " unto my trustees absolutely they well knowing my wishes concerning the same." When he made his will, the testator told his trustees that he wished them to make certain payments out of his estate and to retain any surplus beneficially. After these payments had been made, a substantial sum remained in the hands of the trustees, and it was held that this surplus reverted to the estate of the testator and that the trustees

[37] It has been seen that where the transferee holds property subject to a charge only he is entitled to retain beneficially any surplus remaining after discharging the claims of the chargee. The same would appear to be the case where the transferee holds subject to a strict condition which he fulfils.

[38] (1813) 1 V. & B. 260 at p. 272.

[39] [1922] 2 Ch. 519; see also *Bird* v. *Harris* (1870) L.R. 9 Eq. 201.

[40] At p. 521.

[41] [1950] Ch. 204 (C.A.).

were not entitled to it beneficially. It will be observed that the word "absolutely" appears in the words used by the testator in both cases. In *Re Foord*[39] that word was construed to mean "out and out," carrying not merely the full legal interest but the beneficial interest also. In *Re Rees*,[41] however, the court observed that the will in *Re Foord*[39] was a home-made will and that in such an untechnical document that word deserved that untechnical meaning, but that the will before them had been prepared by a lawyer and that consequently the word "absolutely" should be construed as defining the extent of the interest given, but not as conferring a beneficial interest.[42]

V. *The words used by the transferor may create a personal obligation binding on the transferee towards the third party*

This is perhaps the most interesting and the most difficult situation. For if the obligation owing to the third party is not a contractual one, and does not arise as the result of a condition imposed on the transferee, nor out of a charge on the property, nor yet out of a trust relationship, it is not easy to know how to describe it, nor how to frame a claim on behalf of the third party. The facts in *Re Hodge*[43] make a good starting point. The testatrix, who died in 1934, devised to her husband (who was appointed executor and sole residuary legatee), "my freehold land and buildings . . . in consideration of him paying" an annuity of £2 per week to the testatrix's sister. The will then provided that if this property should be sold, the annuity should cease and in lieu thereof the husband should invest £2,000 in securities and pay the income therefrom to the sister for life, and after her death the investments were to be divided between the sister's children. At the time of her death, the testatrix and her husband had a joint banking account on which they owed some £6,000, which debt was secured by mortgages of various properties including the land devised to the husband. This land was sold by the husband in 1939 for £2,750 and the purchase money paid to the bank in reduction of the indebtedness on the joint account. Until the land was sold, the net rents derived therefrom were insufficient to pay the sister the £2 per week, but the husband made up the deficiency out of his own pocket, disbursing some £212. He did not in fact ever execute an assent to the property vesting in him, and said that he made the payments because he considered himself a trustee,

[42] This distinction often arises in cases where the devisee is required to make certain payments for charitable purposes and these do not exhaust the property devised; see, for example, *Att.-Gen.* v. *The Wax Chandlers' Co.* (1873) L.R. 6 H.L. 1, especially at pp. 19–22, *per* Lord Cairns.

[43] [1940] Ch. 260.

and not because he thought he was under any obligation to do so. In 1939, after the sale of the land, he took out a summons asking whether in the event of his accepting the devise, the will imposed a personal obligation on him to pay the annuity irrespective of the value of the property devised. Farwell J. held that the acts of the husband were sufficient to show that his equitable estate as devisee had vested in him and said[44] that it was a "devise in consideration of making certain payments; . . . that is a gift on a condition and if the gift is accepted, then the obligation fixes on the devisee and that creates a personal obligation which he has to perform. . . . The plaintiff is under an obligation from which he cannot escape to provide this £2,000 for the benefit of . . ." the sister and the children.

A similar situation arose in *Re Lester*.[45] The testator bequeathed shares in two companies to his son A. W. L. "subject to" the payment by A. W. L. of certain annuities to the testator's son A. J. L. for life, and thereafter to A. J. L.'s widow, and thereafter to A. J. L.'s daughter. The legatee, A. W. L., admitted that the words imposed on him a personal obligation to make the payments, but he asked the court to determine whether the shares were charged in favour of the annuitants. Simonds J. felt unable to distinguish between the words "in consideration of" used in *Re Hodge*,[43] and the words "subject to" used in the instant case, and said[46] "In either case the words are apt to create a personal obligation. On the other hand, where there is no reference to the legatee as the person by whom the payment is to be made, but the property is merely given subject to the payment of a certain sum, it may well be that the effect is to create a charge on the property, but not to impose a personal obligation on the legatee. . . . I should not be justified in saying that the words in question also create a charge on the subject matter of the legacy."

There are earlier cases in which such a personal obligation has been held to arise. In *Re M'Mahon*,[47] the testator bequeathed a farm to his son T. and then provided (inter alia) ". . . It is my will that my son . . . do give unto my daughter Catherine the sum of £350 to be paid in three instalments." The testator died in 1896 and the son T. went into occupation of the farm. In 1900, the payment not having been made, the daughter, C., took out an originating summons asking for a declaration that she was entitled

[44] At pp. 264–5.
[45] [1912] Ch. 324.
[46] At p. 326. *Welby* v. *Rockcliffe* (1830) 1 Russ. & My. 571 is an example of the combination of a charge and a personal obligation.
[47] [1901] 1 Ir.R. 489.

to her annuity, and to this she was held entitled. The Vice-Chancellor said [48] : " The fact of his acceptance of the gift, which I hold to be subject to this condition, makes him personally responsible for the payment . . . to the testator's daughter. . . . It is not open to him now to set up the case that the property is not of sufficient value. He has taken his chance for that, and it is immaterial whether it is so or not." [49]

Rees v. *Engelback* [50] is a similar case. The testator devised certain business premises to his executors and trustees on trust to permit his son to carry on the business " upon the terms and conditions following." These included an obligation on the son to pay certain annuities to the testator's widow and daughter. On the son failing to pay the annuity to the daughter, she filed a bill praying for a declaration that she was entitled to the annuity, and this she was granted, the son having incurred a personal obligation to pay the annuity " and by his answer confessed an Equity." Sir James Bacon V.-C., based his decision thus [51]: " Now, upon the authority of *Messenger* v. *Andrews*,[52] and even without the authority of that case, upon very plain principles of justice and law, the defendant, who admits that he has enjoyed the benefit given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced in this court, of fulfilling those conditions."

In *Messenger* v. *Andrews*,[52] the testator bequeathed legacies to his son R. and his daughter M. He then gave to his son J. a freehold farm and a lease of a public-house and said, " and my will is that, in consideration of the above bequest, my son J. shall pay " the legacies to R. and M., the sum of £60 to one W., and all the testator's debts. The son J. entered into possession of the public-house, carried on trade there, but five years later, on discovering that the debts of the testator greatly exceeded the value of all personal assets, he filed a bill asking that the balance of the debts might be raised rateably out of the different freehold properties devised by the will. Lord Lyndhurst held that, if the son had in fact accepted the bequest (as to which he directed an inquiry), he was personally liable to discharge the debts, for the testator

[48] At p. 492.

[49] It is to be observed that whereas in *Re Hodge* (*supra*) and *Re Lester* (*supra*) the transferee asked for a declaration of the extent of his obligations, in *Re M'Mahon* it was the third party who took the initiative. The procedure was not through an administration action for the estate was otherwise fully administered; and the order made was, " Order accordingly, declaring (the son) personally liable for the payment of £350, amount of legacy and directing him to pay the same within three months."

[50] (1871) 12 Eq. 225.

[51] At p. 237.

[52] (1828) 4 Russ. 478.

had made "the payments of his debts the price at which his son was to purchase the public-house. . . ." [53]

Curiously enough, many of the cases [54] in which a personal obligation is cast on the transferee are concerned with the old rules relating to the words of limitation necessary to pass a full fee simple. It will be remembered that, before the Wills Act, 1837,[55] a devise of land without words of limitation gave a life interest only unless an intention to pass the full fee simple could be deduced. And one of the most frequent methods of finding such an intention was where the testator had imposed on the devisee a personal obligation to make payments to third parties or charged such an obligation on the estate given. This principle is explained in *Doe d. Willey* v. *Holmes*,[56] where Lord Kenyon said: "In cases of this kind the question has always been whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events . . . in the latter case he takes a fee; otherwise he might be a loser by the devise." So also in *Doe* v. *Snelling*,[57] Le Blanc J. says: "If the devisee be personally charged with the payment of debts, or if the debts be charged on the quantum of estate given to the devisee, he must take the fee; otherwise if he only take for life, he may be a loser or the estate may be insufficient." [58] In these cases, therefore, the personal obligation imposed on the transferee operated to give him the largest possible estate so that he should not suffer a loss. In later days, it casts on him a personal obligation irrespective of the value of the property transferred to him and is wholly unconnected with any question as to the quantum of estate to be taken by the devisee.[58a]

None of the cases so far mentioned defines the obligations of the transferee or the rights of the third party beyond saying that there is a personal obligation on the transferee which he has incurred because "he has taken his chance," [59] or because "it is the price of the gift to him" [60] or because of "very plain principles of justice and law." [61] There are, however, other statements which come nearer to some sort of definition of the relationship between the transferee and the third party. In *Northumberland* (*Earl of*) v. *Granby* (*Marquis of*),[62] where the obligation on the transferee was

[53] At p. 482.
[54] See *Duffy* v. *Duffy* [1920] 1 Ir.R. 122 at pp. 125–6, *per* Ronan L.J.
[55] s. 28.
[56] (1798) 8 T.R. 1 at p. 2.
[57] (1804) 5 East 87 at p. 98. See also *per* Lord Ellenborough at pp. 93–4.
[58] *Pickwell* v. *Spencer* (1872) L.R. 7 Ex. 105, is an excellent illustration of this situation.
[58a] But *cf.* note 76, *post*.
[59] *Re M'Mahon* (*supra*).
[60] *Messenger* v. *Andrews* (*supra*).
[61] *Rees* v. *Engelback* (*supra*).
[62] (1760) 1 Eden 489.

a release of all claims he might have on the testator's estate, it was said [63]: "If he has (accepted the legacy) he must perform the condition; it being a standing maxim of equity *qui sentit commodum sentire debet et onus*. . . ."[64] Now I consider the acceptance of a conditional legacy as a *contract* or *debt*; and if you accept it you take it with the condition annexed." The obligation was also based on contract in *Gregg* v. *Coates*,[65] where a testator directed his trustees to allow A to occupy a mill for so long as he might want it "he nevertheless keeping the premises in . . . repair and paying a rent of £100 per annum." A went into occupation but the premises were later completely destroyed by fire, and A was held liable to reinstate them and to pay the rent due between the burning-down and the reinstatement. Sir John Romilly M.R. said,[66] " . . . this must be treated as an implied contract entered into by the person who accepts the estate."

It is suggested, however, that it is by a comparison with an analogous situation that the true nature of the transferee's obligation may be deduced. That analogy arises in actions by a remainderman against a tenant for life (or his executors) for permissive waste. It will be remembered that a tenant for life who is impeachable for waste is liable for permissive waste when an obligation to repair has been imposed upon him.[67] What is the nature of this liability of the tenant for life to the remainderman? If the action was in tort, before the Civil Procedure Act, 1833,[68] it would not have survived the death of the tortfeasor; after that Act, such an action survived (in certain cases) provided it was brought within six months of the executors taking out representation. In *Woodhouse* v. *Walker*,[69] such an action was treated as being in tort and was successful because it was brought within that period. In *Re Williames*,[70] the action was brought beyond that period, but all the judges were agreed that it was not an action in tort, and so was unaffected by the Civil Procedure Act, 1833. In the

[63] At p. 499.

[64] "He who derives the advantage ought to sustain the burden." See Broom's *Legal Maxims* (10th ed.), pp. 482–6. The maxim "*Cujus est dare, ejus est disponere*" (the bestower of a gift has the right to regulate its disposal) was pressed into service in *Scot* v. *Haughton & Fuller* (1706) 2 Vern. 560, where Mrs. F. bought twenty-four 1d. tickets in a lottery called "The Wheel of Fortune," and distributed them among her servants on condition that if twenty shillings or more should "come up." her daughter should have one half. The ticket held by the foot-boy produced £1,000 and he was compelled to hand over one half to the daughter.

[65] (1856) 23 Beav. 32.

[66] At p. 38.

[67] See Cheshire, *Modern Real Property*, p. 364.

[68] s. 2; now replaced by Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (3).

[69] (1880) L.R. 5 Q.B.D. 404.

[70] (1884) 52 L.T. 41; (1885) 54 L.T. 105 (C.A.).

court below, Kay J. said [71] it was based on "breach of a condition or implied contract." In the Court of Appeal, however, all three judges inclined to the view that it was an equitable obligation, Fry L.J. saying,[72] "For myself, I prefer the language used by Bacon V.-C. in the case of *Rees* v. *Engelback*,[50] where he said that where it was a personal liability it could be enforced in a court of equity." It was in *Jay* v. *Jay*,[73] however, that this question was most closely analysed. This was another action by a remainderman against the executors of a deceased tenant for life and brought beyond the period allowed by the Civil Procedure Act, 1833. Following *Re Williames*,[70] the court held that it was not an action in tort, but one based on an equitable obligation and that a court of equity would not apply to the equitable remedy the limitation contained in section 2 of that Act, and that the action was therefore not barred. In an instructive judgment Sankey J. said [74] "... it is possible to regard the cause of action accruing to a remainderman as arising: (1) out of tort, or (2) out of an implied contract, or (3) by reason of a court of equity compelling the person who has taken the benefit to fulfil the conditions upon which he took it. This is by no means an unprecedented position in our law, for the history of the action for trespass on the case affords a striking example of how a purely tortious remedy was applied to cases of contract." And he comes to the conclusion that the action is not based on tort; nor on contract for "it would be extremely difficult to say how it was made, when it was made, or to give it some of the ordinary incidents of a contract," but that "the truer view is ... that equity under the circumstances compels the performance by the person, who has enjoyed the benefit of the estate, of the burden attached thereto." [75]

It is suggested that the analogy of this relationship between tenant for life and remainderman is applicable to those cases where a transferee of property is held to be under a mere personal obligation to the third party. The third party's rights are personal against the transferee, and are not against the property transferred; they are equitable, but do not arise under a trust; and, in particular,

[71] At p. 44. The obligation was also treated as contractual in *Batthyany* v. *Walford* (1887) 36 Ch.D. 269 (C.A.).

[72] At p. 107. Brett M.R. (at p. 106) said, "... he has come under an equitable liability which a court of equity will enforce." Baggallay L.J. (at p. 107) said, "It is a liability in the nature of an obligation. In my opinion it is not a contract and strictly not an implied contract."

[73] [1924] 1 K.B. 826.

[74] At pp. 829–31.

[75] Preston and Newsom, *Limitation of Actions*, p. 137, deduce that such an action would be barred after six years; but see the note on *Jay* v. *Jay* (*supra*) in 40 L.Q.R. 391.

the obligations of the transferee may be greater than those of a trustee, for he must perform the obligation even though it cost him far more than the value of the property transferred. The circumstances in which such equitable protection will be granted have certainly not yet been fully worked out. So far, it is only devisees and legatees who have been subjected to this personal obligation,[76] but, on principle, it would seem that the third party equally qualifies for protection where A gives property to B *inter vivos* and at the same time requires B to make some payment to C.

[76] See also *Re North* [1952] 1 All E.R. 609 (reported after this article went to press) where a gift by will to A and B was construed as a gift to them *in common* because it imposed on them ("on condition that") a personal obligation to pay "in equal shares" 10s. a week to X for life.

THE CONTROL OF DISCRETIONARY EXECUTIVE POWERS IN FRANCE

MAXIME LETOURNEUR AND C. J. HAMSON

I. INTRODUCTION

THE note which follows in French was prepared by Monsieur M. Letourneur, a maître des requêtes au Conseil d'Etat and the senior Commissaire du Gouvernement,[1] for my personal information. It is, however, so valuable that it obviously demands publication. But though of an extreme lucidity and precision, it may require, for its understanding by a common law lawyer, a context and an introduction.

The reader will observe that a good many of the cases which M. Letourneur cites are unreported, some because they had been decided almost contemporaneously with the composition of his memorandum. Part of the value of the memorandum consists precisely in that it is not a comment by an outsider upon the business of the Conseil. It is an extract from the notebook kept for his own guidance by an officer of the Conseil who occupies therein a critical position. The judgments of the Conseil are really orders preceded by a succinct and formalised statement of reasons, which may be regarded as almost a formula. Variations in the formula apparently small have practical effects of great importance. M. Letourneur was concerned to tell me how the formula stood at the time at which he was giving me the information, and what were the practical consequences of the actual formula. The Conseil d'Etat is a department of State more important than our old Chancery, and the Commissaire du Gouvernement holds an office more exalted than that of the clerks; still perhaps the nearest analogy to M. Letourneur's memorandum would be an exposition by a clerk in Chancery of the state of his Register of Writs, in which he explains whether he could introduce a "*cum*" clause into the writ running "*ostensurus quare*," what kind of "*cum*" clause he would introduce, and what were the effects of the particular clause. It is this which gives to M. Letourneur's memorandum its fascinating interest.

The reader should also remember that M. Letourneur was not concerned to describe the work of the Conseil generally; he was

[1] On the nature of this office see my article in 68 L.Q.R. 60 (1952).

answering a number of questions which I had asked. We were not dealing upon this occasion with the action for damages raised by a citizen against the State in respect of a wrong he alleges himself to have suffered. Such actions fall within the Conseil's "*recours de pleine juridiction*," a very important but distinct section of the Conseil's judicial business. I was concerned only with the "*recours pour excès de pouvoir*." [2]

In such a *recours* the citizen does not claim damages. He does indeed question the legality of the administrative act, but he does so for the purpose of procuring only the annulment of that act. He "defers" that act to the "censure" of the Conseil. The action is not really one "*inter partes*," between himself and the administrative official (which it is in a *recours de pleine juridiction*); it is more an action "*in rem*" against the administrative act. In a *recours pour excès de pouvoir* the plaintiff is in some sense a spectator of the argument between the Conseil and the administrative official, usually a Minister. He can indeed, and normally does, take part in it; he is entitled to see every document which the Minister submits to the Conseil and to reply to any argument raised by the Minister—the process is in the French sense fully "*contradictoire*." But the plaintiff need not do so if he does not so choose. It is enough if he has validly seized the Conseil of the question. As a mark of this, in a *recours pour excès de pouvoir* the plaintiff need not be represented by counsel; the issue may be raised by informal plaint in respect of which all fees, except a very minor stamp duty, are waived. Moreover, if the plaintiff is successful, the administrative act is annulled not merely as regards the plaintiff but "*erga omnes*": the administrative act is treated as if it had never come into existence. The order of the Conseil is limited to the mere annulment of the act in question; and it is only quite recently that the Conseil has added any consequential directions at all. It should be noted that, in French, "*acte*" is a most generic term; and includes any administrative order whether in the nature of a general regulation or of a decision affecting only an individual.

My questions were directed to the "*recours pour excès de pouvoir*" because that is in France the process whereby pre-eminently the legality of administrative orders is put in issue and I was

[2] This is not the place to discuss the relation of these two different types of "*recours*," though it is no doubt true that the "*recours pour excès de pouvoir*," which was originally regarded as exceptional, has notably encroached upon the field of "*recours de pleine juridiction*," it being often sufficient to the plaintiff to secure the annulment of the administrative act of which he complains. Such was the view of Alibert, in *Le Contrôle Juridictionnel de l'Administration* (1926), an excellent book which, however, requires bringing up to date.

concerned to discover what judicial control is in France actually and effectively exercised over such orders, especially in the case of Ministers in whom are vested discretionary powers of a wide sort. The direction of my questions explains why M. Letourneur limits his answer not merely to the *recours pour excès de pouvoir* but to some aspects only of that *recours*.

The reader will probably be as little interested as I was in cases of *formal* illegality—for example illegality arising from the fact that Minister A purports to exercise powers vested in Minister B, or does not fulfil a plain condition precedent attached to the exercise of a power—*e.g.*, does not hold the preliminary public enquiry which he was directed to hold. Such illegality is generally speaking as effectively suppressed by the English courts as it is by the French. Its suppression does imply some judicial control of ministerial powers. I do not wish to minimise the extent of that control especially because it may be the only form of control which the English courts today in the result effectively exercise over discretionary ministerial powers. But clearly it is not a real control of the discretionary power as such, in itself. That was the matter which primarily interested me. Accordingly M. Letourneur merely mentions "*vice de forme*" and "*incompétence*" (which concern "*la legalité formelle*") and devotes his attention to the other grounds upon which an administrative act may be attacked and in particular to "*détournement de pouvoir*" and "*violation da la loi*" (which concern what M. Letourneur calls "*la legalité interne*"). "*Excès de pouvoir*" is the generic term which includes the grounds both of "formal" and of "internal" illegality; but its most important aspects are "*détournement de pouvoir*" and particularly "*violation de la loi*," which has now an extraordinary ambit. Indeed, the history of the Conseil's increasing control in this field is mainly an account of the development of these two notions.

The distinction, mentioned in passing by M. Letourneur, in his opening paragraph, between "*les conditions de recevabilité*" and "*les cas d'ouverture*" merits attention. The objection that the plaint is "*non recevable*" is a preliminary issue. The objection may be based upon a variety of technical grounds—*e.g.*, that the plaint is out of time; but it can raise, what alone concerns us here, a fundamental question touching the competence of the Conseil. In this aspect, the "*conditions de recevabilité*" recognised by the Conseil fix the limits of the Conseil's jurisdiction. The "*cas d'ouverture*," on the other hand, determine the manner in which, within those limits, the Conseil will exercise its powers. If the plaint is "*recevable*," the Conseil calls upon the Minister to answer.

What kind of answer by the Minister will, in the particular case, be adequate will vary with the "*cas d'ouverture*" and in accordance, inter alia, with the kind of discretionary power which the Conseil holds to be vested in the Minister. But the Minister *must* answer to the Conseil on the merits if the plaint is "*recevable.*"

Two corresponding trends may be observed in the Conseil's case law. First the Conseil has enormously increased its jurisdiction by enlarging the kind of plaints which it treats as "*recevable.*" It of course respects the constitutional limits which arise from its being an "administrative" court, with the consequences (according to the French theory) that it cannot deal with matters concerning either the legislative function (including therein the conduct of the legislative assembly and the relations of the government with that assembly) or the judicial function (including therein, most unfortunately, the activity of any judicial officer such as *la police judiciaire*). And the Conseil will also not intermeddle with foreign affairs—it will not hear complaints concerning diplomatic acts, or treaty rights or "*faits de guerre.*" But within the administrative field so defined, it claims and exercises an absolute and universal competence. No administrative act can now be withdrawn from its cognisance upon the ground of "*acte de gouvernement*"—which may be translated as "reason of State." This development is particularly striking, seeing that in England the parallel development can only be explained as an admission by the courts, unwillingly no doubt, of the increasing efficacy of something very like "reason of State," which operates to debar the court from enquiry.

Secondly, having thus extended its jurisdiction to include all "administrative" acts without exception, the Conseil has increased its control in the particular case by enlarging its "*cas d'ouverture,*" by requiring, that is, ampler answers from the administrative official upon a greater number of points. M. Letourneur's article deals mainly with these "*cas d'ouverture,*" presuming it to be understood that, in the case of any administrative act, the plaint is "*recevable*"—*i.e.*, that the Conseil is competent to, and will, enquire into the alleged misuse of discretionary powers.

In order to help M. Letourneur appreciate the point of the questions put to him, a statement was prepared for him of the present state of the law in England concerning the control exercised by the courts over executive acts. The statement naturally included an account of recent cases with details of the facts and of the authority under which the executive official purported to act. I found particularly instructive M. Letourneur's reaction to these cases.

When confronted with *Liversidge* v. *Anderson* [1942] A.C. 206, M. Letourneur stated first that he knew of no French text employing terms identical to those of Regulation 18B. Nevertheless it was plain that the Home Secretary was claiming that the court was incompetent to enquire at all into the legality or illegality of his act, since he produced merely the order issued by him in terms of the Regulation and refused to submit to the court any of the grounds upon which he had made the order. In M. Letourneur's view this in France would have raised the question of "*recevabilité.*" To that question the answer in France was absolutely clear. The Home Secretary's act was undoubtedly an administrative act; in respect of such an act the Conseil undoubtedly had jurisdiction—that is to say, effective jurisdiction to require an adequate answer. The Conseil today would most certainly not be fobbed off with the answer that the Home Secretary's act was an "*acte de gouvernement*": *i.e.*, that there was a "reason of State" into which the Conseil could not enquire—which was substantially the answer returned by Sir John Anderson in claiming an unexaminable discretion. Indeed not only was the plaint "*recevable,*" but the power under which the Home Secretary purported to act being one given by statute with condition attached, the kind of answer required from the Home Secretary would be a strict one. "Le Conseil d'Etat (M. Letourneur stated) vérifierait (*a*) si cet arrêté (the Home Secretary's order) est entaché de détournement de pouvoir; (*b*) s'il est fondé sur des motifs faisant état de faits matériellement exacts;[3] (*c*) s'il est fondé sur des motifs de nature à justifier légalement l'application du Defence Regulations 1939 reg. 18B, para. 1." It may be noted that in his article M. Letourneur gives an account (pp. 272–3) of the cases decided by the Conseil d'Etat under the *ordonnance* of October 4, 1944, which conferred upon the Executive an apparently unlimited power to intern "*les individus dangereux pour la défense nationale ou la sécurité publique.*" The largeness of the power did not deter the Conseil from enquiring into the legal validity of the grounds upon which individuals had been interned and from setting at large a good number of internees.

Having thus answered with regard to the *Liversidge Case*, M. Letourneur was then pressed with the distinction between "objective" powers (when the English court will enquire whether the condition of their exercise did in fact exist) and "subjective" powers (where it is enough that the Minister should honestly believe that the condition is fulfilled and his statement that he does

[3] For the distinction between (*b*) and (*c*), see *infra*, pp. 264–5.

so believe is conclusive, subject to the purely theoretical possibility of proving perjury in the Minister): the cases more particularly referred to being *Point of Ayr Collieries* v. *Lloyd George* [1943] 2 All E.R. 546, under Defence Regulation 55 (4) and *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All E.R. 560 under Defence Regulation 51 (1).

I think it fair to say that M. Letourneur was really baffled by this distinction—in the sense that he could not bring himself to believe that such a distinction had seriously been proposed in the English system of law. His first reaction was that he had obviously misunderstood the apparent meaning of the cases cited. Upon being persuaded that he had not, he concluded with evident reluctance that the English courts appeared to recognise an unlimited power vested in a Minister not as Minister but as an individual; that modern French administrative law could not conceive such a power; that if the power were vested in a Minister as Minister, under modern French law the Minister would be under a duty not to act merely capriciously; that the Minister would be acting merely capriciously if he alleged himself to have as Minister formed a belief without adducing to the Conseil, when and if required, any grounds whatsoever for that belief; that the terms of the Defence Regulations cited would certainly be insufficient in French law to produce so astonishing a result; and that in the cases cited the plaintiff's plaint would clearly be "*recevable*" and the Minister put to an adequate and sufficient answer. In his article (pp. 273–4) M. Letourneur cites cases where the Conseil enquired into the actual exercise of very large powers conferred upon Ministers, in apparently unlimited terms and in anticipation of war, to make requisitions "*nécessaires aux besoins du pays.*" M. Letourneur makes it clear that the Conseil does not take it upon itself to judge whether the Minister was right in the action he took—it does not control the "*opportunité*"[4] of the act; but it enquires not merely whether the Minister did believe this, that or the other but whether as Minister he could reasonably have formed the belief which he alleges that he did form, and whether that belief warranted the act in question.

M. Letourneur conceded a purely theoretical possibility that a French statute might create in a Minister a wholly arbitrary power. No such power had in fact been created, and it was exceedingly improbable that it would be created. Its creation would amount

[4] This is the orthodox theory. In practice it is sometimes hard to see the distinction between controlling the opportunity of the act (which the Conseil refuses to do) and "appreciating its legality" (which the Conseil does undertake).

to a subversion of the rule of law upon which the French administrative system was based. He doubted if any political party would, while a democratic régime continued, even contemplate risking the odium which would be incurred by the creation of such a power. If created, it could not be considered an executive power—it would fall wholly outside the existing divisions.

That perhaps was the most interesting aspect of M. Letourneur's answer on this point: his sense that it was of the very nature of an executive power that the conditions of its exercise should be cognisable by the Conseil. The Conseil is part and parcel in France of the administrative system itself. The High Court in England is not a real analogue. The normal English civil servant regards the High Court as outside the English administrative system, as a hostile and at best uninformed stranger whose intermeddling with administrative affairs is apt to be disastrous. He certainly has no unbounded confidence in the administrative good sense of the High Court. A true analogue in England would be a committee of specially experienced civil servants, set up by and in the service, to supervise the conduct of business, primarily with a view to securing the due and orderly dispatch of that business. The relation between such a committee and a particular executive officer would evidently be quite different from that now existing between him and the High Court. What is striking and remarkable in France is not so much the existence of such a committee, but the fact that as the result of a long historical development this committee has become a Court of Law which transacts its business in the light of day and permits the aggrieved subject to act as a litigant in the discussion of his grievances.

* * * * *

The English reader should be warned, if warning is necessary, that the law which the Conseil administers is highly technical and depends upon distinctions sometimes of considerable nicety. The succinctness of its judgments requires a corresponding alertness in the reader. They would not be immediately understood even by a well-instructed French civil lawyer. A distinction of no small importance is that between a *cas d'ouverture* on the ground that the order attacked is based upon "*un fait materiellement inexact*" and one on the ground that the facts are not "*de nature à justifier*" the order. The first ground represents the minimum degree of control which the Conseil will exercise: provided that the facts upon which the administration has acted are true, the Conseil will not interfere with the "*appréciation*" made by the administrative official. Where the second ground is available, the Conseil will

not only examine the basis of fact but will also review the "*appréciation*" itself: at least in order to see "*si cette appréciation est restée dans les limites tracées par la loi*"—a formula of almost infinite flexibility. The question in issue may be whether the Conseil will in the particular instance admit the second ground at all.

The examples given by M. Letourneur in section B of his note show the readiness with which the Conseil does admit the second ground even in cases where powers in the widest terms and of the "Defence Regulations" kind have been given to the Executive. What, however, is equally striking is the willingness of the Conseil in recent times to extend the *cas d'ouverture* based upon "*faits materiellement inexacts*" to acts in respect of which not so long ago plaints would have been held "*non recevable*": as for example the expulsion of aliens and the refusal of a passport. Indeed, the examples given by M. Letourneur in section A evidence a remarkable and most salutary extension of the Conseil's jurisdiction: the passport cases he mentions provide a particularly interesting contrast to recent events in England. It may be added that some members of the Conseil are of opinion that, in view of the rapidity of the development of the Conseil's activities since the Liberation, it may be desirable to call a halt in order to consolidate its achievements.

In the later sections, as a result of particular queries, M. Letourneur deals with the ability of the Conseil (*a*) to enquire into questions of fact when these are in issue and (*b*) actually to obtain adequate answers from a Minister. It is believed by some, not without some cause, that French procedure is, on the whole, better adapted to the resolution of points of law than of fact. M. Letourneur's examples (pp. 276–7) make it clear that enquiries into complex fact are undertaken and determined by the Conseil. From his last series of examples (pp. 278–9) it is evident that the control exercised by the Conseil is *not* a formal control concerned *only* with the *ex facie* validity of the order attacked. Of course if the statutory authority requires the grounds (*motifs*) to be set out in the order, and the grounds are insufficiently or inaptly stated, the order will be quashed for formal defect. But even if it is not formally necessary to set out the *motifs*—and generally in administrative acts it is not necessary, unless the statute specially otherwise requires—even if the order is *not* a "speaking" order, the Conseil is nevertheless adequately equipped to obtain from the Minister a statement of the actual grounds upon which he purported to act. The last series of cases cited by M. Letourneur is very impressive—the Conseil quashes the order unless the Minister

produces to the Conseil evidence which in the Conseil's judgment justifies the order. It is fair to add that the law of evidence, or rather the attitude to evidence, differs markedly in France and England. The French system permits and even requires the litigant to produce evidence otherwise than by oral testimony in open court. The difference between the methods by which evidence is produced helps to explain both the willingness of a French Ministry and the reluctance of an English Department of State actually to produce it.

II

Le recours pour excès de pouvoir est le recours par lequel toute personne lésée par un acte administratif peut en demander l'annulation au Conseil d'Etat. La loi, aujourd'hui l'ordonnance du 31 juillet 1945 (article 32), s'est toujours bornée à indiquer que: "Le Conseil d'Etat . . . statue souverainement sur les recours en annulation pour excès de pouvoir contre les actes des diverses autorités administratives." Aussi toute la théorie de ce recours, notamment les règles fixant ses conditions de recevabilité et ses cas d'ouverture, sont-elles exclusivement oeuvre de la Jurisprudence,[5] oeuvre que le Conseil d'Etat n'a cessé depuis 150 ans de compléter, d'améliorer, de rendre plus efficace.

L'idée dominante, essentielle, qui est à la base du recours pour excès de pouvoir, est qu'il n'assure que le contrôle de la légalité de l'acte administratif; qu'il ne permet pas d'en apprécier l'opportunité, le domaine de l'opportunité étant totalement réservé à l'administration. Ainsi ses cas d'ouverture sont des cas de pure légalité [6]; ce sont les suivants:

(*a*) le vice de forme: la décision attaquée a été prise sans que toutes les formalités prévues par la loi aient été observées, sans que la procédure légale ait été correctement suivie: par exemple, son auteur a omis de prendre l'avis d'un organisme consultatif, ou n'a pas motivé sa décision.[7]

[5] The Conseil's case law is to be found primarily in the *Recueil Lebon*, to which reference is made by the abbreviation Rec. The relevant volume is that of the year in which the decision was rendered. Reference is sometimes given to the *Recueil Sirey* (S.) or the *Recueil Dalloz* (D.) if the case has there attached to it a note of importance. Unless the words "Section" or "Assemblée Plenière" are affixed to indicate a more solemn tribunal, the organ of judgment is the normal "deux sous-sections réunies."

[6] But see footnote 4, *ante*.

[7] D'après la Jurisprudence constante du Conseil d'Etat, un acte administratif ne doit être motivé que si un texte législatif ou réglementaire prévoit cette obligation; ce principe ne souffre exception que dans le cas où l'acte émane d'une commission administrative, dotée de pouvoirs quasi-jurisdictionnels; ce cas est très rare.

(*b*) l'incompétence: la décision attaquée émane d'une autorité qui n'avait pas légalement compétence pour agir;

(*c*) le détournement de pouvoir: en prenant l'acte, l'autorité compétente a respecté la procédure légale, mais a usé de ses pouvoirs dans un but autre que celui en vue duquel ils lui ont été conférés.

Au détournement de pouvoir, peut être rattaché le détournement de procédure qui a fait son apparition en Jurisprudence en 1947.

(*d*) la violation de la loi.

Les trois premiers cas d'ouverture sont clairs et précis; le quatrième est plus vague et a une portée beaucoup plus générale que le Conseil d'Etat a sans cesse augmentée, pour mieux assurer son contrôle. L'expression " violation de le loi " ne doit pas être entendue dans son sens propre, étroit; elle est très large; ainsi sont entachés de violation de la loi, non seulement l'acte pris en méconnaissance d'une disposition législative, mais encore

(i) l'acte pris en méconnaissance d'une disposition réglementaire (décret, arrêté);

(ii) l'acte intervenu en violation de la chose jugée par une juridiction;

(iii) l'acte fondé sur un motif juridiquement inexact;

(iv) l'acte fondé sur un motif inexact en fait, c'est-à-dire reposant sur un fait matériellement inexact;

(v) l'acte fondé sur un motif qui n'est pas de nature à le justifier légalement.

Pour examiner comment le juge de l'excès de pouvoir limite l'action discrétionnaire de l'administration, nous laisserons de côté les cas d'incompétence et de vice de forme, qui ne concernent que la légalité formelle des actes, pour n'examiner que les cas de détournement de pouvoir et de violation de la loi, qui visent la légalité interne et sont ainsi beaucoup plus intéressants. Nous désirons étudier, d'une part, comment le contrôle de légalité que nous venons de définir s'exerce en pratique, d'autre part, comment le Conseil d'Etat est mis à même de l'exercer.

Modalités de Contrôle de la Légalité Interne

Deux cas doivent être distingués:

A. le pouvoir d'appréciation de l'administration n'est limité par aucun texte; il est absolument souverain

Ce cas est devenu très rare; l'on ne peut guère citer que les mesures de police générale, notamment celles intéressant la sûreté de l'Etat, et aussi certaines mesures exceptionnelles prises à l'égard

des fonctionnaires en vertu de lois temporaires généralement intervenues par suite de l'état de guerre.

Le Conseil d'Etat contrôle:

(*a*) si la décision attaquée est ou non entachée de détournement de pouvoir;

(*b*) si elle est ou non intervenue en violation de la loi; mais comme, par hypothèse, la loi n'a imposé aucune condition, aucune limite à l'action de l'administration, le Conseil se borne à rechercher si la décision, soit a été prise en violation de la chose jugée, soit repose sur un motif erroné en droit ou sur un motif basé sur des faits matériellement inexacts.

Nous montrerons, par quelques exemples de Jurisprudence, comment ce contrôle est pratiquement exercé:

(1°) *Mesures de police générale*

Sous cette rubrique, nous trouvons les décisions, ordonnant les expulsions d'étrangers, refusant des cartes de commerçants à des étrangers, refusant de délivrer un passeport aux nationaux.

(*a*) Expulsions d'étrangers.

Décision *sieur Persager.*[8] Le requérant, à l'appui de son recours contre la décision lui enjoignant de quitter le territoire français, soutenait, d'une part, qu'il était un réfugié au sens de la convention relative au statut international des réfugiés, signée à Genève le 28 octobre 1933, et que, par suite, cette convention s'opposait à ce que son expulsion fut ordonnée; d'autre part, que les faits sur lesquels la décision était fondée étaient inexacts, et que notamment il n'avait jamais eu une activité antifrançaise pendant l'occupation; qu'enfin, ces faits, fussent-ils exacts, n'étaient pas de nature à justifier légalement son expulsion.

Le Conseil d'Etat a rejeté le premier moyen comme non fondé par interpretation de la convention de Genève de 1933; il a rejeté le second moyen, également comme non fondé: le ministre de l'Intérieur, dans ses observations sur le pourvoi, avait expliqué avec précision que l'intéressé avait eu une attitude antifrançaise pendant son séjour en France sous l'occupation allemande, et le requérant s'était borné à nier les précisions fournies par le ministre, sans apporter le moindre commencement de preuve au soutien de ses dénégations. Mais, au contraire, pour rejeter le troisième moyen, le Conseil a seulement constaté que la décision était motivée par des raisons d'ordre public et a ajouté qu'il ne lui appartenait pas d'apprécier l'opportunité de cette décision.

[8] C.E. 21 octobre 1949—Rec. P. 431; S. 1950. 3.72.

Décision *Missir.*[9] Le requérant demandait l'annulation de l'arrêté d'expulsion pris à son encontre par deux moyens; il exposait, en premier lieu, que les faits qui lui étaient reprochés étaient matériellement inexacts; le ministre a répondu qu'il avait estimé que la présence de cet étranger sur le territoire français était indésirable, car il résultait des enquêtes faites à son sujet que, membre du parti fasciste italien, il avait profité de cette qualité pour excercer sous l'occupation un véritable chantage sur des industriels français; qu'il avait été mêlé à une affaire de dénonciation d'un officier britannique, dénonciation qu'il aurait sans doute facilitée en mettant en relation la délatrice et un agent de la Gestapo; à ces faits précis, l'intéressé n'avait rien répondu de pertinent; le Conseil d'Etat a rejeté le moyen, en s'exprimant ainsi: " qu'il n'est pas établi que la mesure attaquée ait été motivée par des faits matériellement inexacts." En second lieu, le requérant faisait connaître que, poursuivi devant une Cour de Justice, pour les faits mêmes relevés par le ministre, il avait été acquitté par cette juridiction, et que, par suite, l'arrêté d'expulsion intervenu contre lui avait été pris en violation de la chose jugée par la juridiction pénale; le Conseil a rejeté le moyen comme non fondé, les procédures judiciaires et administratives ayant une cause juridique différente et étant indépendantes l'une de l'autre.

(*b*) Refus de cartes de commerçants étrangers.

Un décret-loi de 1938 a imposé à tout étranger désirant exercer un commerce en France l'obligation d'être muni d'une carte spéciale délivrée par le ministre du Commerce. Dans l'espèce qui a donné lieu à la décision *sieur Galetzky*,[10] le ministre avait refusé d'accorder cette carte au requérant, par le motif que les fonds de commerce disponibles devaient, en principe, être réservés aux Français. A l'appui du pourvoi formé contre cette décision, l'intéressé faisait, tout d'abord, valoir que le motif donné par le ministre n'était pas de ceux qui pouvaient légalement justifier un refus de carte. Le Conseil d'Etat a repoussé ce moyen: le décret-loi ne limitait pas le pouvoir d'appréciation du ministre et ne précisait pas, notamment, les motifs pour lesquels les cartes de commerçants étrangers pouvaient être accordées ou refusées: l'administration était donc libre dans son appréciation. Mais le requérant soutenait ensuite que le motif donné devait, de toute façon, être censuré, car il établissait que le ministre avait, par principe, rejeté la demande, sans se livrer à un examen individuel des titres du réclamant; et le Conseil a accueilli ce second moyen: l'auteur de l'acte attaqué était tenu de procéder à un examen

[9] C.E. 14 mars 1951 (pas encore publiée).
[10] C.E. (Section) 15 juin 1951. S. 1951, 3.93, note M.L.

particulier du cas du requérant, de ses titres, de sa moralité, des motifs de son séjour en France . . . etc. . . .; en s'abstenant de le faire, en repoussant le demande par l'affirmation d'un principe d'ordre général,[11] qui ne trouvait son fondement dans aucun texte législatif, le ministre a donné à sa décision une base juridiquement erronée.

(*c*) Refus de passeports aux Français.

Décision *Imbach.*[12] Le sous-préfet compétent avait limité à certains pays le passeport qu'il avait délivré au requérant et avait fixé sa durée à trois mois (au lieu de 2 ans). Pour contester la légalité de la décision lui refusant l'octroi d'un passeport normal, le requérant soutenait, d'une part, que les faits, sur lesquels cette décision était fondée (à savoir notamment ses sentiments pro-allemands sous l'occupation) étaient matériellement inexacts; d'autre part, que, fussent-ils exacts, l'autorité administrative ne pouvait en faire état, leur inexistence ayant été reconnus par une juridiction pénale qui l'avait acquitté[13]; enfin, qu'en toute hypothése, une activité germanophile ne constituait pas un motif qui permettait légalement de refuser un passeport.

En ce qui concerne le premier moyen, le ministre de l'Intérieur a fait connaître au Conseil d'Etat que l'intéressé avait adhéré volontairement à diverses organisations nazies (qui étaient énumérées), y avait exercé une grande activité et avait fait sur la population une pression constante pour recruter des adhérents à ces formations; le Conseil a jugé: " qu'il ressort des pièces versées au dossier que la décision attaquée n'est pas fondée sur des faits matériellement inexacts."

En ce qui concerne le second moyen, le Conseil a constaté que, contrairement aux allégations du requérant, celui-ci n'avait pas été acquitté par la juridiction pénale; qu'au contraire, il avait été condamné à la dégradation nationale en raison d'actes antinationaux qu'il avait commis pendant les premières années de l'occupation, et qu'il avait été seulement " relevé " de cette peine.

Quant au troisième moyen, le Conseil a décidé; " qu'il appartient à l'autorité administrative, saisie d'une demande de passeport formée par un ressortissant français, d'apprécier si le déplacement de l'intéressé à l'étranger est de nature à compromettre la sûreté

[11] This case provides an interesting contrast to *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284 (C.A.); affirmed [1952] 1 All E.R. 509 (H.L.)

[12] C.E. (Section) 14 mai 1948—Rec. P. 215, and see D. 1949, 226 note J.G.; compare C.E. 22 Apr. 1921, *Leloutre* (S. 1923, 3.25, note Hauriou).

[13] D'après la jurisprudence du Conseil d'Etat, l'administration et le juge administratif sont liés par l'appréciation de la matérialité des faits à laquelle a pu se livrer le juge pénal; ils ne sauraient retenir des faits dont l'existence aurait été niée par ce dernier.

publique, et de refuser, pour ce motif, la délivrance du passeport; qu'elle peut aussi pour un motif du même ordre . . . refuser au demandeur l'accès de certains pays étrangers et limiter la durée de validité du titre délivré; que l'appréciation à laquelle se livre ainsi le préfet ou le sous-préfet n'est pas susceptible d'être discutée devant le Conseil d'Etat statuant au contentieux. . . ."

Décision *Boimond*.[14] L'affaire se présentait dans les mêmes conditions que la précedente; et la décision du Conseil d'Etat est conçue en termes à peu près identiques. Le passeport avait été refusé pour la Suisse, par le motif que l'intéressé avait un proche parent qui s'était réfugié dans ce pays, après avoir été condamné en France par contumace. Le Conseil a constaté l'exactitude matérielle du fait servant de base à ce motif, a relevé que le détournement de pouvoir n'était pas allégué, et il a ajouté que l'appréciation de l'administration sur le point de savoir si le déplacement du requérant à l'étranger était de nature à compromettre la sécurité publique n'était pas susceptible d'être discutée devant le juge de l'excès de pouvoir.

2° *Mise à la retraite des fonctionnaires pendant la durée des hostilités*

Une ordonnance du 7 janvier 1944, prise par le gouvernement provisoire à Alger, disposait: " Pendant une période de temps, dont le terme sera celui de l'année qui suivra la cessation des hostilités, l'admission à la retraite de tous les magistrats, fonctionnaires et agents pourra être prononcée d'office, sans conditions d'âge, dès lors que les intéressés compteront quinze ans de services effectifs admissibles pour la liquidation des droits à pension."

Cette disposition donnait aux ministres compétents tous pouvoirs pour choisir, parmi les agents publics comptant 15 ans de services, ceux qui devaient être mis à la retraite; ces pouvoirs apparaissaient comme tout à fait arbitraires. Mais le Conseil d'Etat a fait intervenir ici le détournement de procédure: il a jugé que l'ordonnance du 7 janvier 1944 ne pouvait être utilisée à des fins disciplinaires: le ministre qui se servirait de la procédure commode et sans formalités, prévue par cette ordonnance, pour mettre à la retraite un fonctionnaire à titre disciplinaire éviterait ainsi la procédure, longue et assortie de garanties pour les intéressés, que la loi a imposée avant que puisse intervenir une sanction quelconque à l'encontre d'un de ces agents publics; il commetrait ainsi un détournement de procédure.[15]

[14] C.E. 16 mars 1949—Rec. P. 128.
[15] C.E. 29 janvier 1947—*sieur Rosanvallon*; Rec. P. 37.
13 janvier 1950—*sieur de Gouttes*—non publiée.

B. LE POUVOIR D'APPRECIATION DE L'ADMINISTRATION EST LIMITÉ PAR LA LOI

I. Dès qu'une condition, même très vague ou très générale, est posée à l'action de l'administration, le juge de l'excès de pouvoir, en sus des points exposés au paragraphe A. ci-dessus, contrôle (au titre du cas d'ouverture de violation de la loi) si la décision attaquée rentre dans le champ d'application de la loi, si les faits sur lesquels elle est fondée sont " de la nature de ceux qui (eu égard à la condition fixée) peuvent légalement la justifier."

Quelques exemples, sur ce point encore, permettront de mieux saisir la portée de cette Jurisprudence.

(1) *Cas des internements administratifs*

Diverses lois ont prévu, pendant la durée de la guerre, le droit pour les préfets de prononcer l'internement des individus dangereux pour la défense nationale et la sécurité publique. La dernière en date de ces lois est l'ordonnance du 4 Octobre 1944, dont l'article Ier est ainsi conçu: " Les individus dangereux pour la défense nationale ou la sécurité publique pourront, sur la décision prise par arrêté du préfet de police dans la Seine, des préfets dans les départements, soit être éloignés des lieux où ils résident, soit être astreints à résider dans une localité spécialement désignée, soit être internés."

Saisi de recours contre des décisions intervenues par application de cette disposition législative, le Conseil d'Etat contrôle les motifs retenus par l'autorité compétente, il vérifie si ces motifs rentrent dans le champ d'application de la loi, s'ils sont bien de la nature de ceux pour lesquels le législateur a autorisé les préfets à prendre des mesures restrictives de liberté, c'est-à-dire si les faits sur lesquels ils sont fondés révèlent que les individus visés étaient dangereux pour la défense nationale et la sécurité publique. Il a ainsi annulé des arrêtés préfectoraux, pris contre des personnes auxquelles on reprochait uniquement des faits de marché noir, ou des actes accomplis en violation de la réglementation du ravitaillement [16] ou une mauvaise volonté évidente à livrer leur production agricole au service du ravitaillement national [17]; il a annulé également un arrêté fondé sur des griefs trop imprécis,[18] des arrêtés intervenus contre des personnes qui avaient accepté d'être nommées maire par le gouvernement, dit " de Vichy," mais auxquelles

[16] C.E. 2 novembre 1949—*sieur Andreani*—Rec. P. 453; 23 novembre 1949—*sieur Meyer*—Rec. P. 502.

[17] C.E. 26 mai 1950—*sieur Barrelon*—Rec. P. 327.

[18] C.E. Ier décembre 1950—*demoiselle Bouché*—non publiée, cas dans lequel il s'agissait d'une personne que le préfet avait internée parce que les habitants de la commune lui trouvaient des allures bizarres.

aucun fait précis dans leur activité publique ou privée n'était reproché,[19] ou une personne qui avait été, dans une commune rurale, trésorière de la section locale d'un groupement crée par le gouvernement précité, mais ne poursuivant que des fins charitables, sans aucun but politique [20] ou un agent d'un établissement militaire qui avait, avant la Libération, accepté d'être le chef d'auxiliaires chargés de la surveillance des abords de l'établissement,[21] ou une personne qui, à son retour de captivité, avait, sous l'occupation, fait partie de groupements d'anciens prisonniers de guerre et y avait assuré des fonctions de direction, alors qu'aucun grief d'activité antinationale au sein de ces groupements n'était relevé par le préfet.[22] [23]

(2) *Cas des réquisitions*

La loi du II juillet 1938 a prévu le droit pour les ministres et les préfets de procéder à toutes les réquisitions nécéssaires aux " besoins du pays." Malgré le caractère assez vague de ce terme, le Conseil d'Etat a vérifié, dans chaque cas dont il a eu a connaître, si la

[19] C.E. 13 avril 1951—*sieur Cléret*—pas encore publiée; 20 avril 1951—*sieur Viguerie*—pas encore publiée.

[20] C.E. 13 avril 1951—*demoiselle Jault*—pas encore publiée.

[21] C.E. 12 janvier 1949—*sieur Leroux*—Rec. P. 17.

[22] C.E. 8 juin 1951—*sieur O'Mahony*—pas encore publiée.

[23] Voici, à titres d'exemples, comment sont rédigées quelques unes des décisions du Conseil d'Etat rendues en la matière:

(a) C.E. 12 janvier 1949—*sieur Leroux*—Rec. P. 17. " Considérant qu'il résulte de l'instruction que les faits sur lesquels s'est fondé le préfet du Loir-et-Cher pour prendre l'arrêté attaqué ne pouvaient pas être regardés comme entrant dans le champ d'application de l'ordonnance du 4 octobre 1944; que, par suite, le sieur Leroux est fondé à soutenir que cet arrêté est entaché d'excès de pouvoir ";

(b) C.E. 23 novembre 1949—*sieur Meyer*—Rec. P. 502. " Considérant qu'il résulte de l'instruction que ledit arrêté a été motivé uniquement par une irrégularité commise par le sieur Meyer à l'occasion d'un transport d'avoine destiné à l'alimentation des chevaux et des mulets de son exploitation agricole; qu'un tel motif n'est pas au nombre de ceux qui entrent dans le champ d'application de l'ordonnance susvisée du 18 novembre 1943 " (texte analogue à celui de l'ordonnance du 4 octobre 1944);

(c) C.E. 13 avril 1951—*demoiselle Jault*—pas encore publiée. " Considérant que le préfet ne s'est pas fondé sur ce qu'elle aurait été dangereuse pour la défense nationale ou la sécurité publique; qu'ainsi la mesure attaquée manque de base légale ";

(d) C.E. 8 juin 1951—*sieur O'Mahony*—pas encore publiée. " Considérant que, dans les circonstances de l'affairs, . . . le motif sus indiqué était étranger au champ d'application des ordonnances des 18 novembre 1943 et 4 octobre 1944 ";

(e) C.E. Ier décembre 1950—*demoiselle Bouché*—non publiée. " Considérant qu'il ressort des observations présentées par le ministre de l'Intérieur sur le pourvoi que l'arrêté susmentionné du préfet de la Mayenne a été motivé par le fait que les habitants de la commune d'Ambrières trouvaient à la requérante, réfugiée venue de Lille, des ' allures insolites,' et, par suite, la soupçonnait d'être en relations avec les Allemands; qu'ainsi le préfet ne s'est pas fondé, pour décider l'internement de la requérante, sur ce que l'intéressée aurait été dangereuse pour la défense nationale ou la sécurité publique; qu'il a fait état de vagues rumeurs dont il lui appartenait de vérifier l'exactitude préalablement à toute mesure restrictive de liberté."

réquisition contestée correspondait à un besoin du pays et a annulé toutes mesures de cette nature qui ne satisfaisaient pas à cette condition.

Les cas sont extrêmement nombreux. Ainsi, ont été annulées pour ce motif, des réquisitions prononcées en faveur:

(*a*) de divers services d'un ministère installés dans plusieurs endroits, afin de regrouper ces services dans un seul local, mais alors qu'il ne résultait pas du dossier que ce regroupement était nécéssaire pour leur bon fonctionnement [24];

(*b*) d'un organisme privé n'assurant aucun service public [25];

(*c*) d'une union départementale de syndicats confédérés [26];

(*d*) d'un commerçant pour lui permettre de procéder à la réinstallation de son commerce [27];

(*e*) d'un médecin, alors que d'autres praticiens sont déjà installés dans la commune [28];

(*f*) d'un restaurateur désirant ouvrir un restaurant à bon marché, alors que des restaurants populaires existent déjà dans la ville [29];

(*g*) d'une entreprise de journal.[30]

Le Conseil d'Etat va même plus loin dans son contrôle: saisi d'un recours contre un arrêté préfectoral, ordonnant la réquisition d'un terrain, pour permettre l'installation de deux baraquements destinés à loger des sinistrés, il a reconnu que le but poursuivi répondait, en principe, à un besoin du pays, mais que la totalité du terrain n'était pas nécessaire pour l'installation projetée; il a, en conséquence, annulé la réquisition en tant qu'elle portait sur une portion de terrain, non indispensable pour l'édification des deux baraquements prévus.[31]

(3) *Cas de l'urgence*

Divers textes, au cas où il y a urgence, confèrent à l'administration des facilités plus grandes pour agir, l'autorisent, par exemple, à utiliser des procédures simplifiées. Le Conseil d'Etat recherche dans chaque espèce si l'urgence alléguée par l'administration existe réellement. Nous pouvons trouver de nombreuses décisions en ce sens, notamment en matière d'expropriation d'utilité publique,[32] de mesures disciplinaires pouvant, pendant la durée de la guerre, être

[24] C.E. 9 novembre 1945—*sieur Morand*—Rec. P. 230.
[25] C.E. 10 avril 1946—*Sté labeylonie*—Rec. P. 112.
[26] C.E. 22 janvier 1947—*sieur Marquigny*—Rec. P. 25.
[27] C.E. 12 décembre 1947—*Cie Gale des Eaux*—Rec. (table) P. 687.
[28] C.E. 25 février 1948—*sieur Pini*—Rec. (table) P. 672.
[29] C.E. 28 mai 1948—*sieur Alfonso*—Rec. (table) P. 672.
[30] C.E. 28 avril 1950—*Le Travail*—non-publiée.
[31] C.E. 17 octobre 1947—*sieur Dupuis de Cultures*—Rec. P. 379.
[32] C.E. (Section) 5 mai 1950—*sieur Caffin*—Rec. P. 261.

infligées aux fonctionnaires, sans qu'en cas d'urgence, il soit, au préalable, nécessaire de recueillir les observations des intéressés.[33]

(4) *Cas divers*

(*a*) La législation prévoit une procédure d'expropriation simplifiée, lorsqu'il s'agit d'effectuer des travaux de caractère militaire. Le juge de l'excès de pouvoir apprécie si les travaux envisagés présentent bien un tel caractère.[34]

(*b*) Un décret du 7 mai 1936 porte que le visa accordé à un film cinématographique peut être retiré, lorsque le maintien de ce visa apparaît contraire aux intérêts nationaux; le Conseil d'Etat recherche si le film à qui le visa a été retiré est réellement de nature à nuire aux intérêts nationaux.[35]

(*c*) Le contentieux de la fonction publique fournirait de très nombreux exemples dans le même sens. Nous citerons seulement deux cas particulièrement caractéristiques:

L'article 128 de la loi du 19 octobre 1946 (portant statut général des fonctionnaires) prévoit que l'autorité compétente procède aux mouvements des fonctionnaires après avis des commissions administratives paritaires, mais que toutefois la mutation peut être prononcée sans cet avis préalable lorsqu'il s'agit de remplir une vacance d'emploi " compromettant le fonctionnement du service et à laquelle il n'est pas possible de pourvoir par un autre moyen même provisoirement."

Dans l'hypothèse où un ministre fait une mutation de fonctionnaire sans consulter la commission paritaire compétente, le Conseil d'Etat vérifie, et si la vacance à laquelle il est ainsi pourvu compromettait le bon fonctionnement du service, et s'il n'était pas possible d'y pourvoir par un autre moyen, en désignant, par exemple, un intérimaire.[36]

Une loi du 15 février 1946 autorise temporairement les ministres à mettre à la retraite certains fonctionnaires à condition que leur mise à la retraite permette une réduction permanente des effectifs. Saisi d'un recours pour excès de pouvoir contre un arrêté ministériel mettant un agent public à la retraite par application de cette disposition législative, le Conseil d'Etat vérifie si, en fait, la mise à la retraite du requérant permet réellement une réduction permanente des effectifs, le ministre devant établir cette réduction.[37]

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[33] C.E. 30 juillet 1949—*sieur Tcherepakine*—non-publiée.
[34] C.E. (Section) 6 avril 1951—*société Aubéry*—pas encore publiée.
[35] C.E. (Section) 5 décembre 1947—*sieur Rivers*—Rec. P. 467.
[36] C.E. 30 juillet 1949—*Syndicat national des Inspecteurs de la Population*—Rec. P. 395.
[37] C.E. 12 novembre 1949—*sieur Carpentier*—non publiée.

II. Pour donner une physionomie plus complète des pouvoirs de contrôle du juge de l'excés de pouvoir, il importe de préciser que le Conseil d'Etat vérifie si la condition, posée par la loi à l'action de l'administration, est remplie, même si elle apparaît comme une condition de pur fait, et même si, par suite, cette vérification conduit le juge à substituer purement et simplement sa propre appréciation des faits à celle de l'administrateur. Son contrôle reste cependant de légalité pure, et s'exerce au titre de " la violation de la loi," car cette appréciation des faits est indispensable pour établir si la condition légale a été ou non satisfaite.

Les exemples à cet égard sont très nombreux et susceptibles d'être trouvés dans les matières les plus variées.

Nous citerons les cas suivants particulièrement typiques:

(*a*) Une loi du 31 décembre 1913 permet de classer comme monument historique tout immeuble dont la conservation présente un intérêt public. Pour apprécier si un arrêté ministériel classant parmi les monuments historiques un immeuble déterminé est légal, le Conseil d'Etat recherche si cet immeuble offre un intérêt public, et à cet effet se livre aux investigations de fait les plus minutieuses, dont une décision du 5 décembre 1947 présente une illustration saisissante.[38]

(*b*) Des lois des 27 août 1940 et 19 février 1942 ont autorisé les préfets à concéder à des personnes qualifiées, en vue de leur exploitation, des terres laissées incultes par leur propriétaire. Pour vérifier si un arrêté concédant des terres est légal, le Conseil d'Etat recherche si ces terres peuvent être regardées comme abandonnées et incultes,[39] ce qui exige des investigations de fait fort minutieuses.

(*c*) Le contentieux de la fonction publique, sur ce point également, fournit des exemples nombreux:

Une ordonnance du 29 novembre 1944 a prévu la réintégration des fonctionnaires évincés de leur emploi en exécution de dispositions législatives prises par le gouvernement, dit de Vichy, à moins qu'il ne soit établi que l'éviction avait pour motif une " insuffisance professionnelle grave " des intéressés. Pour estimer si une décision refusant de réintégrer un agent public, victime d'une des lois du gouvernement précité, est légale, le juge de l'excés de pouvoir doit

[38] C.E. (Section) 5 décembre 1947—*sieur Ploix*—Rec. P. 461. " Considérant que l'hôtel de Sagonne a été édifiée par J. Hardouin-Mansart pour en faire sa demeure; que sa décoration dont subsistent d'importants vestiges, fut confiée aux peintres les plus marquants de la fin du XVIIe siècle; que cet hôtel présente, par son ordonnance, son état de conservation exceptionnelle parmi les rares demeures de cette époque qui existent encore à Paris, et les souvenirs qui s'y rattachent, l'intérêt public qui, aux termes de l'article Ier de la loi du 31 décembre 1913, permet de classer des immeubles comme monuments historiques. . . ."

[39] C.E. 23 avril 1947—*Ministre de l'Agriculture contre Delle Yard*—Rec. P. 157; 25 février 1948—*sieur Mathieu*—Rec. (table) P. 529.

donc apprécier si cet agent, avant l'expulsion de son emploi, avait fait preuve d'une insuffisance professionnelle grave, ce qui le conduit à examiner notamment les notes obtenues par l'intéressé au cours de sa carrière, et ainsi à faire exceptionnellement oeuvre d'administrateur actif [40];

Une disposition législative permet au ministre de la Guerre de mettre d'office à la retraite les militaires de la gendarmerie, qui, physiquement, ne sont plus aptes au service de leur arme. La vérification de la légalité d'une décision ministérielle, faisant application de ce texte, amène le Conseil d'Etat à rechercher si l'intéressé est ou non physiquement apte au service.[41]

III. D'autre part, d'une manière générale, le Conseil d'Etat reconnaît qu'a côté des lois écrites existent certains " principes généraux du droit," qui, bien que non prévus de manière expresse par un texte, s'imposent comme règle juridique ayant valeur législative; aussi, en certains cas, lorsque la loi écrite ne pose aucune condition à l'action de l'administration, il exige que celle-ci se conforme à une condition résultant de l'un des principes généraux du droit. Ainsi le Conseil d'Etat a jugé que le préfet ne pouvait imposer à un propriétaire, par voie de réquisition, des prestations de bois plus lourdes que celles assignées à la généralité des propriétaires de la commune; la limitation des pouvoirs de l'administration ne résulte d'aucun texte législatif, mais est l'application de " la régle de l'équitable répartition des prestations entre les personnes en état de les fournir." [42] Cette jurisprudence, qui a pris un développement récent, est particulièrement remarquable dans un pays " de droit écrit," comme la France.

IV. Enfin, on peut signaler que, lorsque la loi apparaît *in terminis* comme laissant tous pouvoirs à l'administration, le Conseil d'Etat l'interprète parfois comme si, malgré tout, le législateur avait entendu, en réalité, limiter l'action de l'autorité.

(*a*) Une loi du 16 novembre 1940 disposait que: " Pour être valables, les mutations entre vifs de propriété ou de jouissance ainsi que tous les démembrements de propriété portant sur des immeubles ou des droits immobiliers situés en France, doivent être autorisés par le préfet du département du lieu où l'immeuble est situé." Elle ne limitait ainsi, en aucune manière, les pouvoirs du préfet d'accorder ou de refuser l'autorisation prévue. Cependant le Conseil d'Etat l'a interprétée comme ne permettant au préfet de repousser la demande de mutation que si celle-ci apparaissait comme faite en vue de réaliser une spéculation ou un accaparement;

[40] C.E. 28 mai 1948—*sieur Gain*—non-publiée.
[41] C.E. 19 décembre 1947—*sieur Sajous*—Rec. P. 476.
[42] C.E. (Section) 1er février 1946—*dame Sornin de Leysat*—Rec. P. 35.

en conséquence, il a annulé des arrêtés préfectoraux refusant l'autorisation de procéder à une mutation, parce que la demande, concernant l'achat de propriétés rurales, émanait d'industriels ne connaissant pas la profession agricole,[43] ou parce que l'acquéreur avait déjà acheté, l'année précédente, un immeuble dans le département et qu'en raison de la pénurie des logements, il convenait de favoriser l'achat par des habitants de la région.[44] Evidemment le Conseil n'a adopté cette interpretation restrictive audacieuse que parce qu'il s'agissait d'une loi du gouvernement dit de Vichy, qui était manifestement contraire aux principes traditionnels du droit français, édictant la liberté des transactions entre particuliers.

(*b*) Une loi du 11 septembre 1941 dispose qu'aucune spécialité pharmaceutique ne peut être exploitée qu'après avoir été revêtue du visa du ministre de la Santé publique; elle ne limite en rien les pouvoirs du ministre d'accorder ou de refuser ce visa. Le Conseil d'Etat a cependant jugé que ces pouvoirs n'étaient susceptibles d'être exercés qu'en vue d'assurer certains objectifs, notamment celui d'empêcher la vente de produits " nuisibles à la santé et à la moralité publique." [45]

Modalités D'Exercise du Contrôle

Les pouvoirs de contrôle que le Conseil d'Etat se reconnaît ainsi n'ont évidemment une efficacité réelle que si l'administration consent à exposer au juge de l'excès de pouvoir les motifs qui l'ont fait agir. En principe, sur la communication qui lui est donnée des pourvois, elle a tout intérêt à s'expliquer le plus complètement possible, afin de défendre les mesures attaquées et d'obtenir le rejet des requêtes. Cependant, il est des cas où l'administration compétente soit volontairement, soit par négligence, ne fournit pas les explications suffisantes.

A. Que fait alors le Conseil d'Etat? Plusieurs hypothèses doivent être distinguées.

(1°) Le ministre, à qui le dossier a été communiqué pour avoir ses observations, ne répond pas et ne renvoie pas le dossier. Le cas est prévu par l'article 56 de l'ordonnance du 31 juillet 1945, qui, reprenant une jurisprudence antérieure, décide qu'après mise en demeure adressée au ministre de renvoyer le dossier avec ses observations, le Conseil statue, en tenant pour établi que, par son silence, le ministre " est réputé avoir acquiescé aux faits exposés dans la requête."

[43] C.E. (assemblée) 9 juillet 1943—*sieur Tabouret*—Rec. P. 182.
[44] C.E. 22 décembre 1944—*sieur Baudouin*—Rec. P. 330.
[45] C.E. 24 mai 1949—*sieur Fergant*—Rec. P. 239.

(2°) Le ministre répond qu'il a perdu le dossier qui lui a été envoyé ou qu'il n'a plus dans son dossier personnel les pièces qui eussent été de nature à éclairer le Conseil. Dans ces circonstances, le Conseil d'Etat décide: " qu'ainsi, le Conseil d'Etat est mis, par le fait de l'administration, dans l'impossibilité d'exercer le contrôle de legalité qui lui appartient; que, dès lors, l'arrêté (attaqué) doit être regardé comme entaché d'excès de pouvoir." [46]

(3°) L'administration répond, mais ne donne pas d'explications suffisantes. En ce cas, le Conseil constate:

(*a*) soit que l'allégation du ministre n'est pas corroborée par les pièces du dossier [47];

(*b*) soit qu'aucun fait précis ne corrobore l'allégation administrative [48];

(*c*) soit qu'aucun commencement de preuve n'est apporté à l'appui de l'allégation suivant laquelle. . . .[49]

La conclusion est la même: l'annulation de la mesure attaquée comme non justifiée.

Parfois le Conseil va plus loin: il retient les allégations du requérant, par le motif que celles-ci n'ont pas été contradites.[49] Enfin, dans une décision du 2 mars 1951,[50] il a écarté une argumentation ministérielle comme fondée sur des pièces qu'il a estimées " non dignes de foi."

B. Ainsi le Conseil d'Etat est parfaitement armé contre la carence ou la mauvaise volonté de l'administration de s'expliquer; on conçoit, dans ces conditions, que, dans la majorité des cas, les ministres ne font aucune difficulté pour présenter leurs observations et apporter toutes les justifications possibles pour établir la légalité des actes déférés au juge de l'excès de pouvoir.

[46] C.E. 12 juillet 1949—*sieur Koenig de Belliard de Vaubicourt*—Rec. P. 348; 25 janvier 1950—*sieur Oulié*—Rec. P. 54; 9 mars 1951—*sieur Pignière*—pas encore publiée.

[47] C.E. 22 juillet 1949—*sieur Wattard*—non publiée.

[48] C.E. 7 février 1951—*dame Gollot*—pas encore publiée.

[49] C.E. 2 février 1951—*sieur Daudé*—pas encore publiée.

[50] C.E. 2 mars 1951—*sieur Mesure*—pas encore publiée—" . . . qu'il resulte de l'examen du dossier que l'exactitude matérielle du grief, que le sieur Mesure conteste d'ailleurs formellement, n'est corroborée par aucune pièce digne de foi."

NOTES ON RECENT CASES

CERTIORARI—ERROR WITHIN JURISDICTION—SPEAKING ORDER

R. v. *Northumberland Compensation Appeal Tribunal* [1952] 1 T.L.R. 161 (C.A.).

The common law is gradually elucidating coherent principles as to when an order, brought up on certiorari, will be quashed by the High Court. The Tribunal was required, "in accordance with" Regulations, to fix compensation for loss of office occasioned by the National Health Service Act, 1946. The Divisional Court, *per* Lord Goddard L.C.J., held that a written decision of the Tribunal should be quashed for error of law on its face: the Tribunal misconstrued the Regulations in considering only the applicant's service with a Hospital Board. He had other relevant service.

The appeal failed. Thus it was reaffirmed that certiorari sometimes lies, not merely for excess of jurisdiction, defect in a tribunal's constitution or procedure, or fraud, but for error of law disclosed by the record. The proposition has caused excitement, but has always appeared in *Halsbury* (now, volume 9, 887). It was unsuccessfully argued that the proposition is confined to justices, by contrast with "statutory tribunals"—a distinction obviously inexact. Morris L.J. said, "Once the body . . . is properly . . . described as an inferior court . . . certiorari will issue on any of the grounds recognised by law." This principle of all or nothing was also adopted in *R.* v. *Chancellor of St. Edmundsbury*: see [1947] K.B. at 274; [1948] K.B. at 212, 216.

The judgments are enriched by an adventurous and plausible account by Denning L.J. of the history of certiorari for mere error. He found it unnecessary to consider the "very nice question" whether error undisclosed by the record goes to jurisdiction. If so, extrinsic evidence of the error is admissible. The question, on which the authorities are sadly inconsistent, turns on whether Parliament has empowered the Tribunal itself to determine the point involved. *Semble*, this was not so in *R.* v. *Manchester Legal Aid Committee* [1952] 1 All E.R. 480. There an aid certificate, granted to a trustee in bankruptcy, was quashed because, as appeared *aliunde*, the Committee had wrongly considered relevant the bankrupt's assets, not the trustee's.

The opinion of the High Court that there is error (of whatever kind) on the face of proceedings, must be immaterial if Parliament empowers the tribunal conclusively to determine the point. Can a statute do this only by expressly taking away certiorari, or is language like that considered in *R.* v. *Ludlow* [1947] K.B. 634 sufficient?

R. B. C.

CHARITABLE TRUST—EDUCATION—CONSTRUCTION—EJUSDEM GENERIS RULE—MAIN OBJECT

Re Shaw's Will Trusts [1952] 1 Ch. 163.

A testatrix constituted a trust for (inter alia) the teaching, promotion and encouragement in Ireland of the fine arts, self-control, oratory, deportment, the art of social intercourse and the other arts of public, private and professional business life. Held (Vaisey J.): The trust constituted a valid charitable trust since it was of an educational nature and beneficial to the community.

It appears that the learned judge decided that the main object of the trust was educational, that education included more than mere teaching, that there was no non-charitable purpose in the will such as would vitiate the whole gift, and that he was entitled to read *ejusdem generis* with the art of social intercourse, the other arts of public, private and professional life.

The question being, then, one of construction, we need not be unduly perturbed by the contrary decision in *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C. 447 (which was not discussed by Vaisey J.) where the trust was to promote by means of an Institute, the moral, social, spiritual and educational welfare of Welsh people in London. There the question of the main object of the trust seems only to have been considered by Lord Normand, who distinguished *Inland Revenue Commissioners* v. *Falkirk Temperance Cafe Trust*, 1927 S.C. 261 because in that case the predominant purpose was charitable. But in the Court of Appeal, Scott L.J. had said that even if a social club was not the main object of the Institute it was enough to prevent its being a public charity ((1945) 173 L.T. 221, 223).

It is submitted that it is not clear whether, when the main object is clearly charitable, the existence of subsidiary non-charitable modes or objects will vitiate the trust: see Scott L.J. (*supra*), but compare Greene M.R. in *Re Strakosch* [1949] Ch. 529,

539 : " If the object and the means indicated are clearly charitable, then the court is not astute to look for possible but subsidiary, non-charitable means which might be within the words used "; also Vaisey J. (*supra*, at p. 168) that it is inadmissible " to test the matter by presupposing perverse and unreasonable methods of applying it [the income], as, for example, . . . entirely to the teaching . . . of deportment." But it is submitted that if there is a direction to attain an object by a prescribed improper method the trust would fail as a charitable trust: *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] A.C. 31.

P. D. S.

CHARITABLE TRUST—PUBLIC ELEMENT—POVERTY CASES

(a) *Re Coulthurst, Coutts* v. *Coulthurst* [1951] Ch. 661 (C.A.).
(b) *Re Scarisbrick, Cockshott* v. *Public Trustee* [1951] Ch. 622 (C.A.).

(a) The decision of Vaisey J., noted *ante*, p. 98, has been affirmed on appeal. A trust for the benefit of widows and orphaned children (of the deceased employees of a certain bank) implies in itself an element of poverty or privation, especially when (as here) it specifically requires attention to their " financial circumstances." Accordingly, in view of *Gibson* v. *South American Stores* [1950] Ch. 177, C.A., the trust was charitable, although the beneficiaries were to be chosen by reference to employment in a particular business.

(b) The decision of Roxburgh J., noted *ante*, p. 98, has been reversed on appeal. As regards the general rule that a valid charitable trust must contain an element of public benefit, the so-called " poor relations " trusts are exceptional even where they contemplate an immediate distribution.

CONFLICT OF LAWS—FOREIGN REQUISITIONING DECREE—PROPERTY IN ENGLAND—EFFECT—TREATY OF PEACE WITH HUNGARY—INTERPRETATION.

Bank voor Handel en Scheepvaart v. *Slatford and Another* [1951] 2 All E.R. 779.

The plaintiff, a limited company incorporated and carrying on business in Holland, deposited some gold bars in London in 1939.

In May, 1940, Holland was overrun by Germany and became enemy territory.

On May 24, the A.I. Decree of the Netherlands in exile purported to requisition all property abroad of Dutch nationals for the duration of the war.

Some time later the Board of Trade, acting under the Trading with the Enemy Act, seized the gold and vested it in the Custodian of Enemy Property who sold it; he transferred the proceeds to the Administrator of Hungarian Property under the Treaty of Peace (Hungary) Order, 1948. All shares in the Dutch bank were controlled by a Hungarian national domiciled in Switzerland.

In May, 1950, the A.I. Decree was rescinded. The plaintiff brought an action against the Custodian in conversion; alternatively, he sued the Administrator for the return of the property.

In the action against the Custodian the plaintiff, relying on *Lorentzen* v. *Lydden* [1942] 2 K.B. 202, alleged unsuccessfully that the Dutch Decree, not English law, applied on the grounds of public policy. Devlin J. held that to do so would be to create a new head of public policy, not " as a restriction on acts . . . harmful to the community, but . . . as a positive force to give an act validity which it would otherwise lack."

Public policy was not identical with political expediency; that was a matter for the legislature. Following *El Condado* (1939) 63 Ll.L.R. 330, he applied English law as the *lex situs* and disregarded the foreign decree claiming extraterritorial effect, whether it was penal or not. Any foreign decree, claiming extraterritorial effect over movables in England, could not be enforced; public policy operated, not to enforce, but to negative the enforcement of a foreign decree which, by the rules of Private International Law, would otherwise be applicable.

The claim against the Administrator succeeded; the property was not subject to liquidation under the Peace Treaty as " belonging to, or held or managed on behalf of . . . any Hungarian national." The company and the shareholder were different persons and the property of the company was not affected by the Treaty.

F. C. K. C.

CONFLICT OF LAWS—INFANT—CUSTODY—PREVIOUS ORDER OF FOREIGN COURT—EFFECT

McKee v. *McKee* [1951] A.C. 352 (J.C.).

The parties, American citizens, married in 1936 and until 1946 were resident in the United States. In 1942 the marriage was dissolved

by a Californian court which, by a subsequent order, granted the custody of the child of the marriage to the mother. The father, probably in anticipation, removed the infant to Ontario, and action was brought there to enforce the Californian order. The courts of Ontario tried the issue on its merits and awarded custody to the father. The Canadian Supreme Court reversed the order. Upon appeal to the Privy Council the order of the Court of Appeal of Ontario was restored. After pointing out that the relevant laws of Ontario, England, Scotland and most of the American states were identical, Lord Simonds said that the sole test must be the welfare of the child, which, if within the King's allegiance, is entitled to the protection of his courts. Orders of foreign courts were and had always been subject to this consideration. In so far as *Di Savini* v. *Lousada* (1870) 22 L.T. 61 indicated that an English court must abdicate jurisdiction to a foreign court of the nationality or domicile of the infant, it was incorrect. The alleged authority for this assertion in *Nugent* v. *Vetzera* (1866) L.R. 2 Eq. 704 was tempered by the language of the court which showed that, in enforcing the particular foreign order, it was not surrendering its right of jurisdiction but was exercising a discretion. The judgment of Morton J. in *Re B's Settlement* [1940] Ch. 54 was approved with the caveat that the Guardianship of Infants Act, 1925, had not amended but only confirmed pre-existing law.

The opposite view was probably best expressed by Robertson C.J.O. (dissenting) in the Ontario Court of Appeal. In his opinion the infant ought to have been returned to the country of which he was a national, in deference to the order of the foreign court, since all the parties were domiciled, and up to the evasion of the order had been resident, there. It is possible, however, to reconcile both views since the rule affirmed by the Privy Council gives courts a wide discretion which may be exercised in deserving cases in favour of a guardian appointed by the courts of the child's nationality or domicile.

D. J. L. B.

CONTRACT—BAILMENT—CONDITIONS EXCLUDING LIABILITY—FUNDAMENTAL BREACH—MISDELIVERY

Alexander v. *Railway Executive* [1951] 2 All E.R. 442.

The plaintiff, accompanied by C., deposited packages at a railway station. He paid charges and received a ticket containing, inter alia:—an exception from liability in certain circumstances for

misdelivery, and from any further claim once the luggage had been delivered to anyone giving such evidence of loss of tickets and ownership or authority to collect as the defendants might consider satisfactory. It was found that the plaintiff had sufficient notice of these conditions.

Subsequently the defendants allowed C., without the plaintiff's authority, access to the luggage from which he removed articles; and later, on the faith of an allegation that the tickets had been posted to him but lost, delivered the luggage to him, which he misappropriated.

Devlin J. in a lucid judgment, held that when C. was allowed to open the luggage (access to which even by the owner was forbidden) there was a breach of an implied term of a fundamental nature, which rescinded the contract, ended the bailment, and excluded the conditions inserted for the protection of the defendants. This effect may be compared with that in *Edwards* v. *Newland* [1950] 2 K.B. 534 where a bailee, who without permission parted with possession of goods, was held absolutely liable for their loss, though it occurred without negligence of the sub-bailee.

Alternatively the learned judge was of the opinion that, even if the defendants were not precluded from relying on the conditions, these would not serve to exempt them from liability. He could find no reasonable grounds which might have justified the defendants presuming loss of tickets; nor was the misdelivery condition applicable, since he believed that in this context it must bear a meaning narrower than that of any delivery, even deliberate, to the wrong person, and be restricted to cases involving some mistake or inadvertence on the part of the deliverer.

An examination of this judgment, together with *Webster* v. *Higgins* [1948] 2 All E.R. 127 (C.A.) where a clause excluding warranties was held not sufficiently clear to abrogate a collateral parol agreement constituted by an offer of guarantee and the signing of a hire-purchase agreement, demonstrates clearly the strictness with which the courts construe conditions inserted in contracts to exclude liabilities imposed by law.

G. G. W.

CONTRACT—FRUSTRATION—UNCONTEMPLATED TURN OF EVENTS

British Movietonews, Ltd. v. *London and District Cinemas, Ltd.* [1951] 2 All E.R. 617 (H.L.).

The facts of this case were stated, *ante*, p. 100, in the *Cambridge Law Journal* of 1951. The House of Lords now have held, reversing

the Court of Appeal, that, as a matter of construction of the terms of the agreement, it was still binding on the parties.

A more interesting feature of the case was the conflict of opinion between Denning L.J. and their Lordships concerning the doctrine of frustration. In the Court of Appeal Denning L.J. had held that by a doctrine analogous to frustration the court had power to qualify the literal terms of a contract and do therein "what is just and reasonable," not only where a frustrating event which swept away the foundation of the contract had occurred, but where there was only an uncontemplated turn of events. Viscount Simon was at pains to reject such a suggestion. Quoting Lord Loreburn he said, "No court has an absolving power but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted." In such cases the court reached a decision which was "just and reasonable" by putting a just construction on the contract based on the "presumed common intention of the parties." In all these cases "the question is really at bottom one of construction."

This conflict has two aspects. The first is as to when the courts will regard a contract as frustrated. Their Lordships here rejected the suggestion of Denning L.J. that an uncontemplated turn of events was sufficient. The second is as to the court's view of its function in such cases. Denning L.J.'s view that it exercised an inherent absolving or qualifying power was rejected. Their Lordships' view, however, deserves comment. The courts cannot construe the subjective intention of the parties. Often the parties had no intention with respect to the new situation because they did not contemplate it. The courts presume a common intention from the intention as expressed in the contract, and from the court's view of what the parties as reasonable men must be deemed to have intended.

G. P. W.

CONTRACT—PROMISSORY ESTOPPEL—FORBEARANCE AS CONSIDERATION

Combe v. *Combe* [1951] 2 K.B. 215 (C.A.).

Before a divorce decree absolute, husband and wife agreed on the wife's yearly allowance. He paid nothing, and, after seven years, she sued on the agreement.

Byrne J. relying on the principle of the *High Trees Case* [1947] K.B. 130 (a promise intended to be binding, intended to be acted

upon, and actually acted upon, binds the promisor), gave judgment for the wife : [1950] 2 All E.R. 1115. The Court of Appeal unanimously reversed this decision. If there were a bilateral contract, it was unenforceable, as attempting to oust the Divorce Court of the control it has under, currently, the Matrimonial Causes Act, 1950 (see *Gaisberg* v. *Storr* [1950] 1 K.B. 107). And the *High Trees* principle was held inapplicable because its effect can be negative only—to deny a party opportunity to insist upon "strictly legal rights"; but not to establish a cause of action. Nor was there a unilateral contract; the court (not raising the question of *Gaisberg's* applicability to unilateral contracts) found no request by the husband for the wife's forbearance.

Denning L.J. considered Byrne J.'s finding—that the husband intended the wife to act on his promise, under the *High Trees* principle—equivalent to a finding of implied request. If the *High Trees Case* really means no more than that an act done *at the request* of the promisor constitutes consideration, its principle is not merely traditional but trite. It was, however, believed that Denning L.J. originally professed to enumerate a novel and larger principle : namely that the promisor would be bound *whether or not* he had requested the promisee's act.

"Promissory estoppel" which binds the promisor, when justice requires, if the promisee has in fact and reasonably relied upon the promise, whether or not any act by him was requested, may be a desirable principle. It is adopted by the American *Restatement, Contracts*, s. 90 (see *Williston on Contracts*, ss. 138–140 (1936)) and, by 1948, had been approved, by decision or dicta, in 16 of the United States and one-half of the federal circuits: Seavey, "Reliance on Gratuitous Promises," 64 Harv.L.Rev 913, 925 (1951). If the doctrine is accepted, it should, however, be recognised that it serves justice equally as sword or shield (Seavey, *op. cit.*; *Restatement* (*supra*), illus. 2; *Ricketts* v. *Scothorn*, 57 Neb. 51; 77 N.W. 365; 73 Am.St.Rep. 491 (1898)), and that the present negative limitations stem not from a weakness in the doctrine, but from a desire to avoid dangers arising from improper or unnecessary applications. *High Trees* itself, because there was no reliance by defendant, flaunts *Foakes* v. *Beer* (1884) 9 App.Cas. 605. And traditional grounds, such as estoppel as to *fact*, or waiver, account for other cases using the words of the *High Trees* rule.

R. H.

CONTRACT—SET-FORM—EXCLUSION OF COMMON LAW LIABILITY—INNOCENT MISREPRESENTATION OF EXTENT OF EXCLUSION—VARIATION BY PAROL.

Curtis v. *Chemical Cleaning and Dyeing Co., Ltd.* [1951] 1 K.B. 805 (C.A.).

The plaintiff took to the defendants a wedding dress for cleaning, and was handed a receipt to sign; without reading it, she asked why, and the assistant intimated, quite innocently, that the defendants would not accept liability for certain risks, including damage to or by beads and sequins: in fact, it contained a clause excluding all liability for damage howsoever arising. The dress came back inexplicably stained, and the defendants relied on their exclusion clause.

The court had no difficulty in finding a misrepresentation by the defendants' assistant, and, following a dictum of Scrutton L.J. in *L'Estrange* v. *Graucob* [1934] 2 K.B. 394, agreed that this invalidated the exclusion. The majority found that in the circumstances the exclusion clause had never become part of the contract. Denning L.J. however argued that the defendants could only exclude their common law liability by an express stipulation brought home to and assented to by the plaintiff as part of the contract. Fraud or misrepresentation apart, the plaintiff's signature of course is irrefragable evidence of this assent; but any words or conduct giving a false impression would be enough to negative it: if the defendants had said nothing, yet their conduct might well have conveyed the impression that the receipt contained no conditions, or at least no exemption from liability, and that would suffice. His Lordship admitted certain difficulties in rescinding the contract for misrepresentation, and preferred to cut the knot by giving as his principle that the defendants were disentitled to rely on an exemption obtained by innocent misrepresentation.

Whether this case is decided in law or in equity is hard to tell: according to Denning L.J. it does not matter nowadays. The representation might perhaps have been found sufficient to raise an estoppel; it is not yet clear how their Lordships' decisions may affect the rules of admissibility of parol evidence to vary a written contract. Denning L.J. in his broad and vigorous judgment has made clear the difficulties of those who seek to bind us with set-form exemptions from liability: apparently any conduct inconsistent with such an exemption, or its extent, will serve to bar it.

See also *Harling* v. *Eddy* [1951] 2 K.B. 739, which his Lordship brings within the ambit of this case and its predecessors.

K. W. A.

CRIMINAL LAW—ATTEMPTED MURDER—MENS REA

R. v. *Whybrow* (1951) 35 Cr.App.R. 141 (C.C.A.).

W. was convicted at assizes of the attempted murder of his wife who complained that he had connected the electricity supply to the soap dish in the bath and she had in consequence received a shock. The judge directed the jury: "... If you are ... satisfied that in doing that he intended to kill his wife or to do her grievous bodily harm, then he would be guilty of attempted murder." W. appealed to the Court of Criminal Appeal.

In delivering the judgment of the court, Lord Goddard L.C.J. admitted that there had been a misdirection of the jury but upheld the conviction under the proviso to section 4 of the Criminal Appeal Act, 1907, as no substantial miscarriage of justice had occurred. He said, "there is no question that there was a misdirection and the jury should have been told that the essence of the offence was the intent to murder. ..."

It has long been thought that, although the requirement of *mens rea* in murder is satisfied by any one of the recognised forms of malice aforethought, in attempted murder it is necessary to show that the prisoner actually intended to kill. The law was so expressed by Maule J. in *R.* v. *Bourdon* (1847) 2 Car. & Kir. 366 and by Patteson J. in *R.* v. *Cruse* (1838) 8 C. & P. 541. This means that if a blow is struck with intent to cause grievous bodily harm but not to kill, if death results the requirement of malice aforethought is satisfied and the crime will be murder. But if death does not ensue the crime cannot be attempted murder although it may be a wounding with intent to cause grievous bodily harm or an attempt to commit that offence.

The apparent illogicality is explained by the fact that in the crime itself it is the *actus reus* which is prohibited and which is all important. In the attempt *mens rea* is the essence and the *actus reus* is ancillary and often *per se* lawful.

This clarification of the law of attempted murder is particularly valuable because attempts to murder are felonies punishable by a maximum of imprisonment for life whereas most other attempts are misdemeanours carrying far lighter sentences.

J. P. C.

CRIMINAL LAW—EVIDENCE—DISPOSITION TOWARDS A PARTICULAR CRIME—OTHER OFFENCES

R. v. *Hall* [1952] 1 All E.R. 66 (C.C.A.).

The appellant had been convicted on an indictment containing eight counts, charging him with committing acts of gross indecency with three men. Separate trial for the three groups of counts was refused, it being held that all evidence on each of the groups was admissible on the trials of the others.

The Court of Criminal Appeal, while upholding the conviction, qualified the remarks it had made in *R.* v. *Sims* [1946] K.B. 531 where Lord Goddard L.C.J. had read a judgment largely prepared by Denning J. The court in *Sims* dealt with evidence of similar acts showing a disposition towards a particular crime and said "if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek justification, but is admissible irrespective of the issues raised by the defence." Previously it had been accepted that such evidence was admissible only if it tended to rebut a defence actually raised or clearly about to be raised. The proposition in *Sims* departed from Lord Sumner's ruling in *R.* v. *Thompson* [1918] A.C. 232 that a plea of not guilty does not automatically infer that all possible defences will be raised and evidence justified in consequence.

Criticism of the remarks in *R.* v. *Sims* made by the Judicial Committee in *Noor Mohamed* v. *R.* [1949] A.C. 182 has now been accepted by Lord Goddard, but he emphasises that the criticism was on "one passage only in a long judgment."

It appears that the rule now is that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, and such justification is not given simply by a plea of not guilty.

In *Hall* evidence of similar acts could properly be called by the prosecution when it became clear that the accused relied on mistake, accident, or absence of *mens rea* as a defence. These defences had in fact been apparent from the magistrates' preliminary examination and Lynskey J. was correct in considering the evidence to be admissible and in refusing separate trials.

With all respect to the apparent logic of the dictum in *Sims*, it is felt that the traditional view, once again established, is more in keeping with the liberal spirit in our law which refuses to countenance evidence prejudicial to the accused.

Comparison may be made with *R.* v. *Harrison-Owen* [1951] 2 All E.R. 726 (C.C.A.).

E. H. G.

CRIMINAL LAW—LARCENY—OWNER STEALING OWN GOODS FROM BAILEE

Rose v. *Matt* [1951] 1 K.B. 810.

Matt, who had bought a model aeroplane engine from S., had delivered a clock to S. as security for the price and S. had a power of sale over the clock if the sum due to him was not paid within a month. Subsequently Matt clandestinely removed the clock because, as he said, he thought S. might sell it.

An information was laid against Matt for larceny but the justices dismissed it because he had not intended to charge the bailee S. with the loss of the clock in conversion or detinue. The prosecutor appealed by case stated.

A Divisional Court, in allowing the appeal, held that an owner of goods, who has entrusted them to another in circumstances in which that other has a special property in the goods, is guilty of larceny if he fraudulently takes them away from the other person. Matt had acted fraudulently—the court had no doubt about this—and intended to deprive S. permanently of the special property in the clock. This was sufficient to justify a conviction for larceny; it was not necessary that the defendant should have intended to charge the bailee with the loss of the clock.

Lord Goddard L.C.J. said that, although it was perfectly clear that many of the old cases, in which the question had been discussed, were decided on the ground that the accused took the goods with the intention of charging the bailee, the Larceny Act, 1916, had clarified the position and cases decided before the Act helped in the construction of the Act only where the words of the statute were not clear. This attitude may be contrasted with that of a Divisional Court in *Ruse* v. *Read* [1949] 1 K.B. 377 where the court apparently read the Act in the light of cases decided before it.

[The question of bailment in relation to stealing also came before the court in *Walters* v. *Lunt* [1951] 2 All E.R. 645 where it was suggested that a person who, with guilty knowledge, received property wrongfully acquired by a child under eight years of age, while not being guilty of receiving stolen property, as the goods were not stolen, might nevertheless be convicted of larceny either as a bailee or as a finder.]

D. W. C.

CRIMINAL LAW—MENS REA—INTERPRETATION OF STATUTES—EFFECT OF WORD "KNOWINGLY"

Taylor's Central Garages (*Exeter*) v. *Roper* [1951] 2 T.L.R. 284.

A Divisional Court held, in this case, that the conviction of the appellants by the justices for an offence under the Road Traffic Act, 1930, could not stand because it was based on evidence heard by the justices in a previous case. The case is of particular interest, for the dicta of Devlin J. on the effect of the word "Knowingly." "Where the statute . . . does not contain the word 'Knowingly,' the first thing is to examine the statute to see whether the ordinary presumption that *mens rea* is required applies or not. If it is found that it does not apply, the mere doing of the act is itself an offence and guilty knowledge is irrelevant. If it does apply, I should have thought that the natural result would be that the prosecution must discharge the burden of showing guilty knowledge. All that the word 'Knowingly' does is to say expressly what is normally implied, and if the presumption that the statute requires *mens rea* is not rebutted I find difficulty in seeing how it can be said that the omission of the word 'Knowingly' has, as a matter of construction, the effect of shifting the burden of proof from the prosecution to the defence."

In his judgment Devlin J. considered *Reynolds* v. *G. H. Austin & Sons* [1951] 2 K.B. 135 where a Divisional Court, which included himself, expressed the opinion that the words in the Road Traffic Act, 1930, s. 72 (10), which creates the offence, "If any person uses a vehicle or causes or permits it to be used . . . " all require proof of *mens rea* in the form of knowingly doing or allowing the prohibited act. An attempt to isolate the word "using" from the rest of the section was unsuccessful—to do so said Lord Goddard would be to reduce the law to an absurdity.

Similarly in *Ferguson* v. *Weaving* [1951] 1 K.B. 814, where an unsuccessful attempt was made to extend the principles of vicarious liability to a charge of aiding and abetting, a Divisional Court emphasised that where a statutory offence consists in the "suffering" of an act, guilty knowledge must be shown; for, as was said in *Somerset* v. *Hart* (1884) 12 Q.B.D. 360 at 362, "How can a man suffer a thing to be done when he does not know of it?"

E. M. B.

DEED—OPTION TO PURCHASE—SPECIFIC PERFORMANCE—PLAINTIFF NOT A PARTY TO DEED OF OPTION—LAW OF PROPERTY ACT, 1925, S. 56 (1)—DUE EXECUTION OF DEEDS.

Stromdale and Ball, Ltd. v. *Burden* [1952] 1 All E.R. 59.

By deed of licence, the defendant, a leaseholder, permitted her sub-tenants of the ground-floor to assign their term to the plaintiff company and covenanted that the company should have the option to purchase (at a specified price) her interest in the whole premises. The deed was executed by her, by her sub-tenants and by two sureties. They, but not the company, were described therein as the parties to it. Afterwards, the company sought to enforce the option.

Danckwerts J. granted specific performance, basing his decision on two grounds. Under section 56 (1) of the Law of Property Act, 1925, "A person may take an . . . interest in land . . . , or the benefit of any . . . covenant or agreement over or respecting land . . . , although he may not be named as a party to the conveyance or other instrument." It was held that the option created an equitable interest in land (*London and South Western Ry.* v. *Gomm* (1882) 20 Ch.D. 562), that this was an "interest in land" within the meaning of section 56 (1) and that the company was entitled to rely upon that section as "a person within the benefit of the covenant in question" (*per* Greene M.R. in *White* v. *Bijou Mansions, Ltd.* [1938] Ch. 351, 365). Secondly, the option constituted an offer contained in a deed and, even if revocable, it had not been revoked. When the company accepted it there was a completed enforceable contract.

On the question whether the deed had been properly executed by the defendant, his Lordship said (at p. 62), "It appears to me that at the present day if a party signs a document bearing wax or wafer or other indication of a seal with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed."

In deciding upon whom section 56 (1) can confer a benefit, the judge followed settled principles. He discussed the question whether covenants which do not run with the land fall within the section and reviewed the cases on this point, but his treatment of the option as an interest in land made the question immaterial to his decision. The range of agreement to which section 56 (1) applies has thus been extended, but have its potentialities yet been exhausted?

J. W. E.

EASEMENT OR LICENCE—WHETHER LESSOR ENTITLED TO MAINTAIN EXISTING ADVERTISEMENTS ON PREMISES DEMISED—NO IMPLIED RESERVATION.

Re Webb's Lease. Sandom v. *Webb* [1951] 1 Ch. 142, 808 (C.A.).

From 1939 to 1949 the plaintiff held under a tenancy agreement the upper floors above the defendant landlord's butcher's shop; and in 1949 the landlord demised them to him for a term of years. From 1934 onwards their outside walls had displayed two advertisements: one advertised the landlord's business; the other, for which an advertising agency paid rent to the landlord, advertised Brymay matches.

In 1951 this originating summons was taken out to determine whether the landlord was entitled to maintain these advertisements. Danckwerts J. held that the tenant's acquiescence for 10 years and during the 1949 negotiations showed a common intention to reserve a right and accordingly declared that an implied easement to maintain the two advertisements had arisen.

The Court of Appeal, Evershed M.R., Jenkins and Morris L.JJ., in three similar judgments reversed this decision. The general rule, they said, is that reservations must be express. Morris L.J. (at p. 832) described the issue as "Has the defendant proved that this case is an exception to the general rule?" The tenant's passive acquiescence here might or might not be attributable to a common intention to reserve in the lease an easement or licence (for value and so irrevocable under *Hurst's Case*). The general rule placed upon the landlord the onus of proving that this or some other exception applied. He had failed to do so. Accordingly the appeal was allowed.

There was a tendency to refer to what was claimed as a "right" rather than an easement, which Danckwerts J. had held it to be. The right to his own advertisement might possibly exist as an easement since it might benefit the shop by bringing trade as in *Moody* v. *Steggles* (1879) 12 Ch.D. 261; the other only benefited him by a money payment under a contract.

There were some interesting and perhaps surprising observations *obiter* at pp. 821, 830, as to whether, as a result of the lease, the benefit or burden of the Brymay licence had become assigned to the tenant.

This decision seems to show that the rule against implied reservations extends to licences as well as to easements: the judgments referred cautiously to its supposed exceptions and showed some unwillingness to enumerate or widen them. H. G. D.

EQUITABLE ASSIGNMENT—ABSENCE OF CONSIDERATION—MUST BE COMPLETE AND PERFECT

Re McArdle (*decd.*), *McArdle* v. *McArdle* [1951] 1 All E.R. 905 (C.A.).

In 1944, Mrs. M., living in a house forming part of her late father-in-law's estate, carried out certain alterations bearing the cost herself.

In 1945, those beneficially interested in the estate, expectant on the death of the tenant for life, signed the following document addressed to Mrs. M.

> "In consideration of your carrying out certain alterations . . . we . . . hereby agree that the executors . . . shall repay to you from the said estate, when so distributed the sum of £448."

The tenant for life died in 1948 and Mrs. M. claimed payment.

The Court of Appeal, reversing Danckwerts J., held that on the basis that the document was contractual, the consideration was past, and as it was thus "*nudum pactum*" it could not operate as an equitable assignment for valuable consideration. Nor could it operate as an assignment valid without consideration as it contemplated future action by the claimant and thus was not complete and perfect.

In this case the form of the document was such that the executors would not have been obliged to pay without referring to the beneficiaries to verify that the work had been done; thus the beneficiaries had a *locus poenitentiae* and were entitled to resile.

However, if what had been done had amounted to a gift, complete and perfect, the donors having done everything in their power to make it so, there would have been no reason why the donee should not have taken the benefit, even though the subject-matter was a chose in action, and, since such a transaction would be perfect, consideration would be irrelevant. Further it may be deduced from the judgments of their Lordships that they would draw no distinction between an equitable assignment of a part, and of the whole, of an equitable chose in action : both when complete and perfect being valid without consideration.

A. D. G.

EQUITABLE ASSIGNMENT—GIFT INTER VIVOS—UNREGISTERED TRANSFER OF SHARES

Re Rose, Rose v. *Inland Revenue Commissioners* [1951] 2 All E.R. 959.

The deceased transferred shares in a private company to his wife, and to his wife and R., the second block to be held upon trust for the benefit of his wife and son. By the company's articles, the directors could refuse registration of any proposed transfer, the deceased as governing director having authority to admit or refuse.

The parties executed the transfers before April 5, 1943, but they were not registered until June, 1943. The donor died in 1947. Under the Finance Act, 1946, no duty was payable if a valid gift *inter vivos* took effect before April 10, 1943. Roxburgh J. took *Milroy* v. *Lord* (1862) 31 L.J.Ch. 798 to mean that registration in the company's books was required for a gift *inter vivos*. Equity will not perfect an imperfect gift. In that case, it was not considered whether a transfer of the beneficial interest can precede the legal title. Recent cases, however, show that registration, not being an act to be performed by the donor, is not essential for the passing of a beneficial interest. It was irrelevant that the donor here was also governing director. Accordingly, on the basis of *Re Rose* [1949] Ch. 78, the gift was complete and the beneficial interest passed on execution of the transfer : following *Nanney* v. *Morgan* (1887) 37 Ch. 346 the court would then compel the donor to make the donees' interest effective. If the company refused registration, the registered shareholder could be compelled to hold as trustee for the assignees. So the whole beneficial interest passed, there was a gift *inter vivos* before April 10, 1943, and no duty was payable.

This case may be taken as further limiting the principle that equity will not perfect an imperfect gift. "Imperfect gift" meant originally that not everything required for transfer of legal title had been done, and in such a case, no trust would be implied. But imperfect gift as recently defined refers to situations where some act remains to be done by the donor. The present case restricts it still further, to acts to be done by the donor as donor, not in some other capacity. Unless a trust is implied, which would be difficult, this case involves a new type of equitable interest. This would be novel, but not impossible; compare in this respect *Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & J. 517.

G. A. H.

JURISDICTION—FOREIGN STATE—PREVIOUS SUBMISSION IN WRITING —WHETHER SUFFICIENT

Kahan v. *Federation of Pakistan* [1951] 2 T.L.R. 697 (C.A.).

The appellant contracted to supply tanks to the Government of Pakistan who agreed in writing "to submit for the purposes of this agreement to the jurisdiction of the English courts." Plaintiff sued for breach of contract; defendant entered conditional appearance and issued a summons to set the writ aside in that it impleaded a sovereign state. The master ordered the writ to be set aside and Slade J. upheld his decision. The plaintiff appealed.

The first question concerned the status of the Federation of Pakistan. The Secretary of State for Commonwealth Relations certified that it was an independent sovereign state and this was accepted by both parties for the purpose of jurisdictional immunity. Counsel for the defence, however, kept open the question whether such a certificate was conclusive evidence in the case of a member of the British Commonwealth whose status stemmed from an Act of the Imperial Parliament.

It remained to be decided whether the written agreement constituted submission to the jurisdiction and thereby a waiver of immunity. Two cases were relied upon: *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149, and *Duff Development Co.* v. *Kelantan* [1924] A.C. 797. The latter case decided that an agreement containing an arbitration clause incorporating relevant provisions of the Arbitration Act, which included the right to apply to the court for leave to enforce an award, did not amount to a submission to execution. It was held, in the present case, that an agreement *inter partes* to submit to the jurisdiction was not equivalent to an actual submission; that the respondent government remained immune and could not be impleaded. The appeal was dismissed.

In the *Kelantan Case* the court was only required to decide that an agreement *inter partes* did not constitute submission to execution. The present case has affirmed the view that such an agreement is insufficient even for submission to judgment. It is perhaps unfortunate that these two aspects of submission were not distinguished so that an agreement would be sufficient for judgment while an actual submission would still be necessary for execution.

J. H. P.

TORT—INVITOR-INVITEE—DUTY OF OCCUPIER—" UNUSUAL DANGER " —VOLENTI NON FIT INJURIA

London Graving Dock v. *Horton* [1951] A.C. 737.

The respondent was a welder employed by sub-contractors engaged by the appellants to effect alterations in the hull of a vessel occupied by the appellants. In the course of his employment the respondent, while working on staging erected for the purpose by the appellants, fell from it without negligence on his own part, and sustained injuries. The staging was known by both parties to this action to be dangerously inadequate, and complaints had been made to the appellants without avail.

Lynskey J. dismissed the action on the short ground that since the dangerous condition had been appreciated by the plaintiff it was not an " unusual danger " within the meaning of those words in the celebrated passage from the judgment of Willes J. in *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274.

The Court of Appeal (Tucker, Singleton and Jenkins L.JJ.) unanimously reversed his decision, holding that " unusual danger " when properly construed means " a danger not usually encountered " in the particular circumstances, and further, that a duty rests on an occupier to exercise reasonable care to provide that the premises be in a safe condition.

In reversing the decision of the Court of Appeal, the House of Lords by a majority of three to two (Lords Porter, Normand and Oaksey delivering an admittedly harsh majority decision, while Lords MacDermott and Reid gave arresting dissenting opinions) clarified the scope of the duty owed by the invitor, originally stated in well-chosen but ambiguous terms by Willes J. (*supra*), by holding that a full appreciation of the danger by the invitee discharges the duty to take reasonable care cast upon the invitor. With respect it is suggested that there is much merit in the minority view that " sciens " alone ought not to be the decisive criterion of responsibility in all such cases, and in this case in particular where the invitee encountered an unusual danger which was constant and inescapable, and where there was evidently no willingness on his part to assume the risk involved.

While the House seemed agreed that the very words used by Willes J. to define the duty of an invitor ought not to be construed as though they bore the sanction of a legislative enactment, it is respectfully submitted that only in the dissenting opinions was due caution exercised in this regard.

D. S. C.

TORT—NEGLIGENCE—INJURY TO HUSBAND—INTERFERENCE WITH CONSORTIUM—LIABILITY TO WIFE

Best v. *Samuel Fox & Co., Ltd.* [1951] 2 K.B. 639 (C.A.).

The plaintiff's husband was injured through the defendant's negligence and as a result became sexually impotent. The decision of Croom-Johnson J., dismissing the plaintiff's action for interference with her right to her husband's consortium, has been affirmed by the Court of Appeal.

The claim was put on a dual basis. First, the action of enticement in which it is now established that either spouse can sue for deprivation of the other's consortium. Secondly, the old action of the husband for loss of his wife's consortium. The difficulty was that in the former action it was necessary to show an intentional interference with the consortium, which could not be shown here, while the latter action, though not requiring an intentional interference, was confined to the husband. Birkett L.J. resolved this dilemma by carrying over the idea of reciprocity established in the enticement cases, into the older action. He recognised that by so doing he was extending an action which was an anomaly in present-day society. But he preferred extending an anomaly to leaving "the husband in possession of a cause of action which was denied to the wife." Nevertheless, he held that the appellant must fail, on the ground that the action was maintainable only for total loss of consortium. She had lost only one element, sexual intercourse.

Lord Asquith and Cohen L.J. (as he then was), while agreeing that only total loss of consortium would ground the action, rested their judgments on broader grounds. They were unwilling to extend the husband's action to the wife. It was an anomaly, and to extend it would be inconsistent with its basis, namely, the *servitium* which the wife had owed to the husband, but which the husband had never owed to the wife.

While the disinclination to extend an anomaly is understandable, the view that the action lies only for total loss of consortium seems inconsistent with its basis, in which, as the court emphasised, the element of *servitium* was prominent. The old form of pleading it was *per quod consortium vel servitium amisit*. This very form suggests that mere injury to the wife, causing loss of "services," would ground the husband's action, and the authorities, it is respectfully suggested, bear this out. A recent example of the

husband's recovering for mere interference with his right of consortium caused by injuries to his wife, is provided by *Mallett* v. *Dunn* [1949] 2 K.B. 180.

D. R.

TORT—NEGLIGENCE—RES IPSA LOQUITUR—LIABILITY OF HOSPITAL FOR NEGLIGENCE OF MEMBERS OF STAFF

Cassidy v. *Ministry of Health* [1951] 2 K.B. 343 (C.A.).

The plaintiff entered the defendants' hospital for an operation on two fingers of his hand. During the post-operational treatment he complained vehemently of pain, but the operating surgeon and the house surgeon merely prescribed sedatives. At the end of the treatment, his whole hand was found to be useless.

The Court of Appeal, unanimously reversing the decision of Streatfeild J., held that the doctrine of res ipsa loquitur applied. The hospital authorities had failed to rebut a prima facie case of negligence.

The judgments then diverged. Somervell L.J. was content to decide, applying the principle in *Gold* v. *Essex County Council* [1942] 2 K.B. 293, that all concerned, surgeons as well as nurses, were employed under contracts of service, and that therefore the hospital was vicariously liable.

Singleton L.J. agreed with this, while suggesting more broadly that the hospital was under an obligation to provide competent treatment.

Denning L.J., departing from the traditional approach, stated : " where a person is himself under a duty to use care he cannot get rid of his responsibility by delegating the performance of it to someone else," whether servant or independent contractor. The distinction between contracts of service and contracts for services is important only when it is sought to make the employer liable for some collateral act of negligence of his employees. Liability for doctors depends solely on whether the patient or the hospital employs them. Here the hospital itself owed a duty of care, and was liable for the negligence of its staff regardless of the terms of their employment.

This conception of the basis of an employer's liability need not, of course, be confined to hospital authorities. It seems eminently reasonable, although one must accept it cautiously. However, all three judges distinguished *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K.B. 820: this case is now only authoritative as regards

a hospital's non-liability for consulting surgeons. The error in *Hillyer's Case* was due to a desire to protect the charitable hospitals, declared Denning L.J. The National Health Service now justifies its final correction.

Cassidy's Case is also important in that it provides another illustration that the "control" test, used to decide whether a master and servant relationship exists, is being replaced by one of organisation and subordination to the employer's managerial powers. This appears very clearly in the judgment of Denning L.J. in particular.

R. E. D.

TORT—TRESPASS—VOLUNTARY ACT OF DEFENDANT WITHOUT FAULT

National Coal Board v. *J. E. Evans & Co. (Cardiff), Ltd. and Another* [1951] 2 K.B. 861 (C.A.).

THE defendants, a firm of contractors, were engaged by the Glamorgan County Council to erect workshops on the latter's land. They sub-contracted for the digging of a trench across this land and, in the course of excavation, struck and damaged an electric cable which the plaintiffs or their predecessors had laid just below the surface, but which neither the County Council nor the defendants (who were working from a plan furnished by the Council) knew to be there.

Donovan J., dismissing an allegation of negligence, found the defendants liable in trespass: the act being voluntary the defence of inevitable accident was excluded.

The defendants successfully appealed. Cohen L.J. observed that even under the old law a defendant who was entirely without fault had a good defence to trespass: "No man shall be excused of a trespass . . . except it may be judged utterly without his fault"—*Weaver* v. *Ward* (1616) Hob. 134. The present case was the clearest possible instance of an accident without fault by the defendants—in fact the damage was mainly attributable to the wrongful conduct of the plaintiffs in laying the cable under the council's land—and, said Cohen L.J., it would be contrary to Common Law principles for the plaintiffs to succeed. He furthermore saw no reason to depart from the decisions in *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261 and *Stanley* v. *Powell* [1891] 1 Q.B. 86, in both of which "no negligence" was held to be a defence. Singleton and Morris L.JJ. agreed.

Does this case support the proposition that fault is essential to liability in trespass where the defendant's act is voluntary? Cohen L.J. noted that the plaintiffs, being trespassers themselves, could not have succeeded against the council; he saw no reason why the defendants should be in any worse position. Did the defendants succeed, then, because they were without fault or because the plaintiffs were almost entirely to blame? Even if the former, can it be concluded that fault is an essential ingredient in the law of trespass as a whole? It seems from this case and from those cited above that fault is essential in relation to trespasses to the person and to goods, but it should be noted that, as regards interference with possession where title to land (or chattels) is concerned, fault must be immaterial.

N. C. W.

TRUST—SETTLEMENT OF SHARES IN A COMPANY—"CAPITAL PROFITS DIVIDEND"—INCOME OR CAPITAL—COURT'S GENERAL JURISDICTION TO APPORTION

(a) *Re Kleinwort's Settlements* [1951] 1 Ch. 860.
(b) *Re Maclaren's Settlement* [1951] 2 All E.R. 414.
(c) *Re Rudd's Will Trusts* [1952] 1 All E.R. 254.

(a) A company distributed to its shareholders as a "special capital profits dividend" a quantity of British Transport Stock, representing profit made on a recent transaction. Following *Re Sechiari* [1950] 1 All E.R. 417, Vaisey J. held that a large body of this stock received by trustees of settled shares was to be treated as income and held for the life-tenant. This decision is consistent with the rule in *Bouch* v. *Sproule* (1887) 12 App.Cas. 385 and the principles laid down by Lord Russell of Killowen in *Hill* v. *Permanent Trustee Co. of New South Wales* [1930] A.C. 720: The company's profits had never been capitalised but produced a "windfall" intended to be gathered by those for the time being entitled to income from the ordinary shares.

The learned judge then admitted the existence of a general jurisdiction to apportion receipts between capital and income on equitable grounds; but he thought that such jurisdiction might be limited to cases where a breach of trust had prejudiced the interests of those entitled in remainder. The mere size of the dividend was not a "special circumstance" justifying apportionment.

(b) In *Re Maclaren's Settlement*, the stock was received by a trustee who had bought the company's shares with the life-tenant's consent *after* the announcement of the special dividend. Harman J. refused the life-tenant's claim to an equitable charge over a freehold residence bought with the proceeds of sale of these shares and the stock received in respect of them. He distinguished *Re Sechiari*: here the life-tenant had agreed to the purchase of the shares for the sake of benefiting the capital of the trust, so that what now represented the proceeds of sale of the investment and of the dividend in fact purchased with it, must be treated as capital.

Asked to apportion, Harman J. agreed with Vaisey J. that circumstances justifying apportionment might arise only from a breach of trust. In any event it was only in cases of "glaring injustice" that the court exercised the "right to make a more exact distinction of income and capital," which was all that the exercise of the jurisdiction in question amounted to. He distinguished those rare cases where apportionment has followed the sale of investments cum dividend.

(c) In *Re Rudd*, Upjohn J. said that, in view of these decisions, the question of the court's jurisdiction to apportion in cases of this sort, there being no breach of trust, is now one for the Court of Appeal. But it is submitted that the remarks of Vaisey and Harman JJ. concerning the scope of the general jurisdiction were dicta only: the hesitant limitation to cases of breach was necessary to neither decision.

E. J. G.

WILL—CLASS GIFT—TIME FOR ASCERTAINING CLASS—RULES OF CONVENIENCE—PERPETUITY

Re Bleckly [1951] Ch. 740 (C.A.).

In his will A directed that his property, subject to a prior determinable interest for B, should be divided among all C's children who should attain 21. A died; and, *when B's interest ceased*, C had as yet no children. Subsequently, C begot a daughter who, on reaching 21, claimed the whole bequest, there being as yet no other children. C was still alive; and this action was brought to ascertain the rights of any other of C's children who might be born thereafter.

The "rules of convenience" as to the closing of a class (in the absence of contrary intention) are as follows: (1) Where there is a bequest to the children of X simpliciter, or where such a bequest is made subject to a prior interest, the rule is that the

class closes at the testator's death, or where the prior interest ceases; and no children born subsequently can take. To this rule there is one exception: if, at the time when the class would have closed, as above, it is still empty, then, in order to save the bequest, any children born subsequently can take. (2) But where, as in *Re Bleckly*, there is a bequest to all the children of X *on attaining a given age or other contingency*, whether or not it is made subject to a prior interest, the rule is that the class closes as soon as the prior interest has ceased and the first child is entitled to call for his share; for, without such a rule, it would be impossible to say how large a share he should take.

In *Re Bleckly* no children had been born when the prior interest ceased. Harman J. thinking that, on the analogy of the exception in (1), all children born subsequently should now be capable of taking, held that C's daughter had not become entitled to the whole bequest. This decision was reversed by the Court of Appeal. The exception to rule (1) is an exception of necessity; for it keeps the gift alive, if, at the time of distribution, there is nobody to take. It has no relevance in rule (2); for there the time of distribution does not come until there *is* someone in existence who, having fulfilled the contingency, is ready to take.

These rules as to the closing of a class are sometimes important in applying the perpetuity rule: *e.g.*, where there is a limitation "to X for life with remainder to such of the lawful descendants of Y (a bachelor) as reach 10 years of age." In *Re Bleckly*, however, the gift was so worded that no question of perpetuity could arise.

A. J. L. L.

WILL—DEPENDENT RELATIVE REVOCATION—(a) MISSING WILL—PRESUMED DESTRUCTION ANIMO REVOCANDI REBUTTED—EVIDENCE OF DESTRUCTION—(b) MUTILATED WILL—WHETHER DESTRUCTION CONTEMPORANEOUS WITH UNFULFILLED INTENTION TO ALTER WILL.

(a) *Re Botting. Botting* v. *Botting* [1951] 2 All E.R. 997.

(b) *Re Bromham. Wass* v. *Treasury Solicitor* [1951] 2 T.L.R. 1149.

(a) The plaintiff sought probate of an accurate draft of a missing will duly executed in 1947. Shortly before dying in 1949, the testator made another testamentary document which was invalid. The defendants asserted that the will had been destroyed *animo*

revocandi, and also, in order to rebut the application of the doctrine of conditional revocation, relied upon a judgment by Lord Penzance in *Homerton* v. *Hewett* (1872) 25 L.T. 854. In that case, it was said that the court must be furnished with evidence proving the destruction of the original will before it would apply the principle of dependent relative revocation.

Havers J. in distinguishing the present case from this "formidable authority," thought that there were other ways in which the fact of destruction could be deduced. Circumstances permitted the inference that the testator actually destroyed the will conditionally upon the validity of the instrument of 1949. Since the latter was ineffective, the court applied the doctrine of conditional revocation, and following *Powell* v. *Powell* (1866) 1 P. & D. 209, pronounced for the will of 1947.

Lord Penzance's remarks seem broad in face of considerable authority characterised by *Welch* v. *Phillips* (1836) 1 Moo.P.C.C. 299, that, providing possession of a missing will be traced to him, the presumption must prevail until repelled, that the testator himself destroyed it. Furthermore, *Patten* v. *Poulton* (1858) 1 Sw. & Tr. 53, appears to render it unnecessary for parties seeking probate to show how an original instrument was in fact destroyed.

(b) A testator expressed a wish to alter his will, but upon the death of his solicitor postponed the matter. At his own death, almost a year later, a mutilated will was found by the bedside. The Crown contended that, as the date of destruction was unknown and the interval between the expression of intention and death so long, it was impossible to say that destruction was made conditionally upon making a new will.

Lord Merriman P. followed *Re De Bode* (1847) 5 N.C. 189 in pronouncing for the multilated will, and said that whether the period during which the intended will was not made was a day or a year, it would not bar the application of the principle of conditional revocation, providing the testator destroyed the existing will with reference to his intention to execute a new instrument. This decision adds to the increasing burdens of those who seek to prove outright revocation by a testator.

D. W. G. S.

BOOK REVIEWS

The Quest of Justice. By Harold Potter, ll.d., of Gray's Inn, Barrister-at-Law, Fellow of King's College, London, and Professor of English Law in the University of London. [London: Sweet & Maxwell, Ltd. 1951. ix and 86 and (index) 2 pp. 12s. 6d. net.]

With the exception of the final chapter, this booklet is the substance of three lectures which the late lamented author delivered at King's College. They are a profound and stimulating study in the lessons that legal history teaches concerning justice and the relations between ethics, law and administration. They deal with the nature of law and justice in four main periods, the Dawn of Justice in the twelfth and thirteenth centuries, the Age of Faith in the fifteenth and sixteenth, the Age of Reason in the eighteenth, and the Age of Hope in the twentieth century. They show that procedure is an essential feature of justice for it determines how far the truth can come out. Professor Potter's deep learning as an academic and practical lawyer, his friendship, sincerity and idealism are manifest throughout this interesting study.

T. E. L.

Negligence in the Civil Law. By F. H. Lawson, d.c.l., of Gray's Inn, Barrister-at-Law, Professor of Comparative Law in the University of Oxford. [London: Oxford University Press. 1950. xvi and 335 and (index) 7 pp. 25s. net.]

Anyone coming fresh to this book would do well to consider the title before opening it. The term " Civil Law " is not to be limited to Roman law, but it is usually contrasted with the common law. The book deals with the Roman law and the relevant parts of Continental systems, the Roman-Dutch law, the law of Quebec, and, although the examination of the common law is not its main purpose, there is constant comparison with English, Commonwealth and American case- and statute-law. In addition, the book provides the text, translation and a commentary not only of Digest 9.2 (*Ad Legem Aquiliam*), but also of other relevant Roman texts in and out of the Digest; extracts from German, French, Belgian, Austrian, Swiss, Soviet, Italian, Quebec, Latin-American codes, Canadian statute-law; and also useful notes on some French cases. And all this within the compass of 335 pages. That is a weakness

of the book. So much has been put into it that no single topic has been dealt with deeply. The value of the book to civilians is that it focuses their subject well. Its value to common lawyers could well be expressed in an adaptation of a well-known quotation: "What do they know of the common law, who know only the common law?" Herein are set out the different ways in which different systems grapple with common problems so that everyone may profit.

It is impossible to do justice to this book in a short review, and all that can be attempted is a sketch and consideration of a few points. Part I, the Introduction (pp. 1–79), is a comparative study of the principles of the law relating to damage. It begins with the *fons et origo* of the civil law, namely the *Lex Aquilia*. It is interesting to note that the learned author favours Dr. Daube's view as to the problem of the "Second Chapter," and also prefers his interpretation of the "Third Chapter" to that of Professor Jolowicz. The doctrine of Abuse of Rights (sect. 12), is a fairly good summary of the Roman, Continental and English law. There seems to be a slight uncertainty, probably only in the opinion of the present reviewer, in the treatment of the extension of the *Lex Aquilia* by *actiones in factum* and *utiles* (sect. 15). As to *9.2.27.18–21*, might there not be more historical development behind these texts than the author's notes (pp. 107–8) suggest? The scope of the *actio directa* was gradually being extended by interpretation. "*Quasi ruperit*" in *27.18* seems to show that "*ruperit*" is being extended to cover the case put. *27.19* suggests that owing to interpretation the direct action is now wide enough ("*sufficit*") to cover these facts. In *27.20*, "*quasi de corrupto*" seems to show that by Ulpian's time the direct action is being made to cover this case, whereas earlier in the time of Celsus the widening process had not gone far enough to make it cover similar facts, *27.14*: hence the *actio in factum* at that date. The explanation of *27.21* may be that an *actio in factum* had been given on facts such as these at a time when the direct action was as yet too narrow to cover them, but that when it was widened sufficiently the *actio in factum* survived as a relic side by side with it. As to the Duty of Care (The Scope of the Action, sect. 17) little need be said since all that the author has previously written on it is now well known. "*Culpa*" (sect. 18), Causation (sect. 20), and Contributory Negligence (sect. 21), come next. A point of interest is the examination (pp. 54–5) of Buckland and McNair's brusque rejection of the *culpa-compensatio* idea as applied to Roman law. When he comes to the difficult topic of Measure of Damages (sect. 22), the author handles it as well as could be expected. He adopts Dr. Daube's conception of *damnum*, as to which a different view might well be held. Opinion must also be reserved on the problems of *9.2.23.4*, *41*, *28.4.1 pr* and *4.3.35*. The last section (27), is on Concurrence of Actions, and is one of the best.

Parts II–VI contain the texts, translations and commentaries. As to the Latin translation, the author says (Preface, p. vi); "I have never striven for elegance or an easy flowing style, believing that in a book of this kind the translation should be nothing more nor less than a 'crib.' It is in any case particularly important that a translation of the Digest should preserve as far as possible the infelicities of the original; and it is an advantage rather than the reverse if the student is constantly thrown back on the Latin original." The translation shows care. Thus, to take a random example, the "*et*" in *9.2.44 pr* is given its due significance, whereas both Monroe and Grueber had missed it. There is, however, one matter of importance. Should "*culpa*" be rendered as "negligence" or "blameworthiness?" The latter seems preferable. In *9.2.5.1*, for instance, where "injuria" is being explained as the basis of liability for killing, Ulpian points out that it means, not insult, but contrary to law "*id est si quis culpa occiderit*," that is to say, when a person kills in a blameworthy manner. To translate it, "if one kills negligently" (p. 83), might imply that a wilful killing is not an "injurious killing" or "contrary to law." Yet, in the section on *Culpa* (18), the author does at least advert to the conception of it as blameworthiness. Thus, he says (p. 37), the question is whether "blame can be imputed to him for causing it on the ground that he acted wilfully or carelessly or not like a reasonable man." Perhaps, the author's view that the Romans regarded *culpa* subjectively is responsible for his translation. That view is open to suspicion, and in any case the translation of *culpa* need not necessarily depend on it. The texts in which "*culpa*" occurs are too numerous to enumerate. It is respectfully suggested that, although in a few of them the word "negligence" might be retained, the substitution of "blame" in the others would be more appropriate. Finally, as to the extracts from foreign codes, useful as they are for reference, one wonders whether such bare extracts justify the space they occupy. Might it not be better to lengthen Part I, bringing in extracts which are strictly relevant, and eliminate the latter part of the book?

The above are only tentative suggestions. They cannot, and indeed are not intended to, detract from the value of the book. The author and publishers are to be congratulated on a useful contribution to the subject.

R. W. M. D.

The Rational Strength of English Law. By F. H. Lawson, D.C.L., of Gray's Inn, Barrister-at-Law, Professor of Comparative Law in the University of Oxford. [London: Stevens & Sons, Ltd. 1951. viii and 147 pp. 10s. net.]

This is the third in the series of the Hamlyn Lectures. It proves

that English law is not less neat and rational than systems prevailing on the Continent, that is, rational in the sense that it serves at the present day, and not in times past, in a sane and intelligent way, to further a policy which is either acknowledged or can easily be detected from internal or external evidence, p. 12. The subjects of the lectures are : (1) Sources and General Character of the Law—where it is shown that the perpetuation of law in an unwritten form facilitates the maintenance of continuity in all its varieties better than formulation in a code, p. 24. (2) Contract—comparison with other systems breeds dissatisfaction with our own, *e.g.*, third party rights, consideration and strictness of interpretation, pp. 42–56; but the equitable side of it is good, for " only English law interpolates between fraud and mistake the third category of innocent misrepresentation," p. 60; and this coupled with the concept of undue influence makes us look upon questions of consent differently from Continental systems, p. 62. Our present common law doctrine of mistake is thoroughly logical and bad, p. 70. (3) Property—much of it is richer and more practical, more generalised and more logical than any other, p. 97; while the analysis of property rights is one of the most brilliant creations of English Law, p. 105. (4) Torts—we are getting towards the idea of a general duty of care, pp. 112–4. Torts based on negligence and strict liability are common to all systems, but heads of liability such as trespass, ejectment, defamation are hard to find in Continental law, p. 122. Tort is as neat and logical as it need be, the real trouble is the exaggerated respect paid to some nineteenth century cases which are obstacles to progress, pp. 143–4. The author has drawn upon his wide experience of comparative law, and from that point of view corrects the impression that English law is essentially disorderly and irrational.

T. E. L.

The Sense of Injustice. An anthropocentric view of law. By Edmond N. Cahn, Professor of Law, New York University. [New York: New York University Press, and London: Geoffrey Cumberlege, Oxford University Press. 1949. 186 pp. $3.50.]

This is a difficult book, full of rhetoric and purple patches which obscure the argument. Its avowed object is to throw light on the nature of law, but it succeeds better in revealing the author's wholly admirable sense of justice. Yet every true statement about law throws some light on its nature, and Professor Cahn has many true and interesting things to say. His main headings are Justice and Power, Freedom and Order, Security and Change. These concepts serve as a basis for examining the interactions between legal systems and certain social and psychological needs which find at

once their chief expression and the main guarantee of their satisfaction in the human sense of injustice. This reference to human experience is what is meant by an anthropocentric view. What does the author understand by the sense of injustice? It appears to be that sense by virtue of which certain acts directed towards others are perceived by an individual as attacks both on those others and himself, with a consequential reaction of outrage and anger and preparation for defence. This seems like a fairly intelligible general conception. With its aid it should be possible to establish the general content of the sense of injustice of a particular person or society. It could be observed which acts caused outrage and defensive reactions, and these acts would then, by definition, be unjust. They would, however, be deemed unjust by virtue of the reactions they caused, and to argue that these reactions were caused by this injustice would be arguing in a circle. Yet this is what Professor Cahn appears to do when he asserts that Nature has equipped all men to regard injustice to another as personal aggression (p. 24), and that the human animal is predisposed to fight injustice (p. 25). It is hoped that the reviewer may be forgiven for suggesting that the real object of the book is not so much to instruct as to enkindle; not so much to analyse the sense of injustice as defined as to evoke that particular manifestation of it deemed suitable to the time and place. It can hardly be doubted that nature has indeed equipped some, if not all, men with the sense of injustice as defined by Professor Cahn, nor that this sense has an important biological role in promoting social solidarity and survival. It may be doubted whether that sense can be given any generally valid specific content, but it may be admitted that in many cases it designates as unjust any attack on "equality, desert, human dignity, conscientious adjudication, confinement of government to its proper functions, and fulfilment of common expectations" (p. 22). We may argue that it is desirable that this should be so. We may also argue that any attack on these requirements must diminish security, or the "feel of firm social support" (p. 182) experienced by members of a society. In so far, then, as the sense of injustice leads to the defence of these requirements it must promote security in the community. Whether the sense of injustice by itself can ensure security, or whether security is obtainable without, it is perhaps difficult to establish. But if the price of liberty is eternal vigilance it seems equally true that the price of the individual's sense of security is an adequately supporting sense of injustice in his fellows. It is the author's chief merit to have vividly illustrated the possible relations between law and the sense of security, and to have stressed the importance of an active and adequate sense of injustice for ensuring that it is established and maintained by a legal system.

B. E. King.

The Reform of the Law. Edited by GLANVILLE WILLIAMS, Quain Professor of Jurisprudence in the University of London. [London: Victor Gollancz, Ltd. 1951. 224 pp. 18s. net.]

THIS book was prepared by members of the Haldane Society and before a schism led to the institution of the Society of Labour Lawyers. There are a few places in the book where it is pointed out a little heavily that some progressive step was taken under a Labour Minister, but on the whole it is barely tinged by party colour. In fact reform of the law turns out to have little relation to party politics. Any group, one-coloured or multi-coloured, might have produced a similar hotch-pot of opinion.

As I am a professional teacher of law I naturally take some interest in the conclusions about legal education. At p. 215:

> "At present, the drive of law teaching is towards protecting the dead practices of the past against the imperative needs of the present. It is hostile to the analysis of law in action. It is largely ignorant of important foreign experience—it suffers from complacency. It does not properly utilise the material it has, either of persons or facts. It fails to criticise with the appropriate penetration. It gives us legal habits without legal philosophy."

This is fine strong stuff. For contrast with the despised ways of our law teaching let us see how these authors tackle their problems and particularly their utilisation of material available. Take the enforcement of maintenance orders: they think (p. 147) that by way of enforcement of arrears the court should be empowered to order a proportion of a man's wages to be paid by his employer to the court. Presumably they know the objection of the English trade union movement to such a provision, the existing law of Scotland which allows deduction from wages, and the debate in the House of Commons in which Scots members all advised the English not to enact similar law. Yet the reader gets no hint that there may be difficulties. Now take legal aid (p. 32). The Legal Aid and Advice Act, 1949, is a "stop-gap measure"; we shall have to have "an effective and efficient national legal service, and it is time to begin the preliminary thinking on this important development." It is pleasing to know that they have decided that it is time to *begin* the mere *preliminary* thinking; they may catch up with those who began years ago. The Preface gives thanks "in the writing of the section on Punishment to the research facilities afforded by the Howard League for Penal Reform," from which one would conclude that research has been done. What we get is a few pages (193–202) of commonplaces and well-known views. On insanity and the criminal law (160–161) there is the usual stuff about insane people being hanged because of the deficiencies in the M'Naghten

Rules, without any mention of the statutory inquiry before execution (Criminal Lunatics Act, 1884, s. 2 (4)). Whenever there is evidence (medical or otherwise) of insanity or mental abnormality in a person tried for murder, it is always the practice, should the jury convict, to hold a statutory inquiry : a writer who ignores this does not inspire confidence. In a book of this nature one does not expect any full discussion of proposals, but that does not absolve the authors from playing fair with their readers.

In defence of this book it can be said that it is a sincere effort by a group of lawyers to state what they think are defects and what the remedy should be. It contains much good sense, and in a composite work it is only to be expected that some parts will be below the general standard. They do not claim infallibility. They want a Ministry of Justice, and assume that "it would be the task of the Minister of Justice, when his office is instituted, to canvass opinion on these and other issues before introducing the appropriate Bills in Parliament" (Preface). Should not people well disposed to law reform join in this procession rather than bark at it? The trouble is that the authors, like many people who think of themselves as progressive, have not realised the trend of current affairs. The ordinary method of working out legal changes is by Royal Commissions and Departmental Committees, and if we get a Ministry of Justice it is hardly likely that this process would not be followed. The report of an independent body is more acceptable to Parliament (and to the legal profession and most other people) than something that comes entirely from civil servants. These Royal Commissions and Committees want all the help they can get and they listen to a vast amount of evidence. They often get evidence remarkably like parts of this book, and they find it pretty useless. The need for "something to be done about it" is commonly accepted these days in most matters where in the past there was complacency. Parts of this book read as if they were written during the war or immediately after it, in anticipation of a return to an era of Blackstonian outlook. The current need is for accurate careful work on proposed reforms. A group of practising lawyers could perfectly well make an analysis of part of the law in action, collect data, and then exercise a real and powerful influence on the shape of things to come. Unfortunately it is easier to make proposals in the style of an election address and attempt to ride off criticism by saying that anyway a Ministry of Justice would deal with the matter. They tell us that they "cannot share the average lawyer's self-satisfaction and awful complacency" (p. 216). But surely they have enough of their own and shouldn't want to share anyone else's.

R. M. Jackson.

Current Legal Problems, 1951. Vol. 4. Edited by G. W. KEETON and G. SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. 1951. vii and 425 and (index) 3 pp. £2 5s. net.]

THESE seventeen addresses are of interest to the practising and academic lawyer and cover a varied field of International Law and English public and private law. The papers by Dr. Schwarzenberger—Trends in the Practice of the World Court; Dr. Cheng—International Codification; Mr. Green—Continental Shelf; and Mr. Holland—Diplomatic Immunity, are a tribute to Sir Cecil Hurst on the occasion of his eightieth birthday. Dr. Keeton deals with questions arising for solution in respect of Trusts in the Conflict of Laws, Sir Cecil Carr with the Mechanics of Law-Making. Professor Glanville Williams' inaugural lecture is a penetrating and well documented analysis of the Aims of the Law of Tort. Professor Goodhart convinces one that The Third Man or the Novus Actor Interveniens is a source of confusion and misunderstanding and a real nuisance in the law of tort. Mr. Powell deals with his counterpart in Roman Law. Mr. Scamell examines The Standards of the Ordinary Man in English Law, and concludes that they make justice according to the law to mean justice according to the ordinary man. Mr. Edwards writes critically on Malice and Wilfulness in Statutory Offences and clears up much of the misunderstanding in this difficult topic. Dr. Webber restates the basis of Frustration, deals with English and American cases since the War and considers its application to marriage and leases. Mr. Ivamy is concerned with Estate Agents and the Law, their authority, duties and the circumstances when commission is payable. Mr. Lloyd deals with Recent Developments in Divorce Law, the substantive law and procedure and welcomes the abolition of the rule in *Russell* v. *Russell*. In the field of public law there are three articles: Mr. Fitzgerald—New Town Planner; Professor Friedmann —Public Law Problems in Recent English Decisions—an outstanding contribution; and Professor Schwartz on the United States Supreme Court and Administrative Law.

T. E. L.

The Evolution of Law and Order. By A. S. DIAMOND, M.A., LL.D., Barrister-at-Law. [London: Watts & Co., Ltd. 1951. viii and 334 and (index) 8 pp. 21s. net.]

THIS is a continuation and extension of the author's scholarly study entitled *Primitive Law*. He traces the development of the idea of "law" from the primitive customs of the earliest food gathering tribes when agriculture was unknown, through the periods of

savagery, barbarism, early civilisation and the modern age to present times. The approach is not strictly chronological, for societies existing at the same period present different stages of social and economic development and this is reflected in their notion of law. Economic progress postulates a developing legal system and where economic situations are parallel their legal rules will be similar. It is by relating ideas of law and order to their social and economic environment that Dr. Diamond makes a real contribution to our knowledge of the development of human institutions, marriage, property, inheritance, contract, tort and crime. The rules of the earliest known societies—the Code of Eshnunna discovered in 1947, some two hundred years older than Hammurabi's, those of societies all over the world and the customs of primitive tribes still in existence are analysed and compared. The book is a profound study in anthropology, sociology, religion and in economic and social legal history. It deals with facts, not high-flown theories; it is free from technicalities, interesting and readable. It is recommended to all who are interested in man's progress from his primitive savage customs to the elaborate rules and orders which govern his life today.

T. E. L.

A Textbook of Jurisprudence. By George Whitecross Paton, B.C.L.(Oxon.), M.A.(Melbourne), of Gray's Inn, Barrister-at-Law, Vice-Chancellor of the University of Melbourne. Second edition. [Oxford: Clarendon Press. 1951. xiii and 495 and (index of cases) 11 and (index) 19 pp. 30s. net.]

Since the first edition appeared in 1946 this book has established itself as the leading textbook on the subject. This is due to its scholarship, most readable style, breadth of outlook, the fair treatment and analysis of theories propounded by writers in a variety of languages, wide bibliography, clarity and up-to-dateness. It brings jurisprudence to earth and links it with the living principles of everyday law. There is no need to detail the substantial changes in this edition which are set out in the preface. Suffice it to say that there has been a thorough revision of the text, and a reorganisation of the chapters and sections in the light of the wealth of writing, both books and articles, that has taken place since 1946 and of the constructive criticism of reviewers of the first edition. Some sixty new cases are dealt with, and the Detailed References which appeared at the end of the former edition are now placed at the end of the appropriate chapter. We note in particular the change in the treatment of *Rylands* v. *Fletcher*, pp. 153, 377–8; tests of liability for negligence, p. 379; the effect of compulsory insurance on the law of tort, pp. 374–5,

385–6; the "last opportunity" conception, pp. 386–7; mistake, pp. 366–70; and the critical analysis of *Hannah* v. *Peel*, pp. 464–5. It is a thorough revision, and this is an excellent book.

T. E. L.

Law in the Making. Fifth edition. By Carleton Kemp Allen, M.C., K.C., D.C.L., F.B.A., F.R.S.L., J.P., of Lincoln's Inn, Barrister-at-Law, Fellow of University College, Oxford, Oxford Secretary to the Rhodes Trustees and Warden of Rhodes House. Sometime Professor of Jurisprudence in the University of Oxford. [Oxford: at the Clarendon Press. 1951. xxxii and 605 and (index) 20 pp. 35s. net.]

The merits of this outstanding and original contribution to the study of the mechanism of the law make it a classic on the subject. In the present edition the type has been reset, the work has been tidied up by inserting the various Excursuses immediately after the main chapters and the former series of Additional Notes are incorporated in the appropriate part of the text. Fresh material abounds everywhere; references to the most recent articles in English, Dominion, American and Continental periodicals; decisions and legislation are noted down to June, 1951. Chapter IV has been largely rewritten and re-arranged in view of the recent trends on the theory and working of precedent. The judicial hierarchy from the Privy Council and the House of Lords downwards is explained in detail at pp. 229–241; and the sections dealing with *dicta*, *communis error facit jus*, certainty and flexibility, and principles of interpretation are expanded in the light of most recent decisions. There is a penetrating criticism of the principle expressed by Lord Simonds in *Jacobs* v. *L. C. C.* [1950] A.C. 361 at pp. 248–9. "It is not easy for anybody to know what is authoritative or not. . . . The whole law relating to landlords, tenants, and guests has got itself into a most intricate tangle of artificial distinctions, which nobody can really believe to effect substantial justice" (p. 245) is a statement of truth which cannot be denied. "There is a growing consciousness in the present age of the imperfections of the system and a strengthening desire to correct them . . . the whole system of case-law is passing through a critical stage in its history," p. 333. "There is a marked disposition to mitigate, by various devices, the severity of precedent when it tends to perpetuate error," p. 342. Other points made are the process of judicial ordeal-by-dictum, p. 246, the process of distinguishing is seldom wholly impartial, p. 247, the superior courts have shown less tenderness towards *communis error* and unfortunate decisions that they formerly displayed, p. 318; and the serious defect in finding the relevant authorities, pp. 343–54. Chapter VII

on " Subordinate and Automatic Legislation " is much extended and rewritten. A full account is given of the Statutory Instruments Act, 1946, the *ultra vires* doctrine, orders of mandamus, certiorari and prohibition, and the practical operation of these checks.. The author may rest assured that the numerous changes in substance and form make our debt of gratitude to him the greater.

T. E. L.

Russell on Crime. Tenth edition. By J. W. Cecil Turner, m.c., m.a., ll.b., of the Middle Temple, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. [London: Stevens & Sons, Ltd. Two vols. 1950. civ and 1961 pp. £10 10s. net.]

This new edition of *Russell* has already been welcomed in practitioners' and academic journals as a most important contribution to the criminal law. Its importance in the present reviewer's opinion is not only as a new edition, in which the colossal task of bringing the law up to date in one of the major works on criminal law has been expertly done, but also for the introduction of accounts of the historical development of the law, and above all for the discussion in its historical perspective of underlying legal principle in relation to the common law crimes. In a field where much of the law is to be found in directions of judge to jury in relation to the facts of the case before them, any tendency to look at these judicial pronouncements as the *ipsissima verba* of the law to be accepted without qualification must be guarded against. In the new *Russell* one finds forthright discussion of legal principle, a detailed examination of the cases in the light of principle, and constructive suggestions for reform.

The editor has not confined himself to bringing up to date a standard work, but a great part of the treatise in relation to the major common law crimes has been rewritten and re-arranged. An important discussion of general principle in relation to criminal responsibility and *mens rea* has been introduced (pp. 19–41). The chapter on " Homicide " has been rewritten and clarifies the changes which have occurred in principles of liability. In its 221 pages it is a treatise on homicide in itself. Of particular interest are the criticisms of the present law of constructive murder, and the suggestions as to its scope, the discussion of the present limits of provocation with a full analysis of the effect of *Holmes* v. *D. P. P.*, the criticisms of the present law governing manslaughter with emphasis on the uncertainty arising from the adoption of external standards in relation to the unlawful act doctrine, and " gross negligence." The editor takes the view that since the case of *Andrews* v. *D. P. P.* there can be no cases of constructive manslaughter or the unlawful act doctrine " since it was there made

plain that it was not sufficient to prove merely that it was in the course of the commission of a tort or even of a crime that the prisoner brought about the death" (p. 639). In such cases it is suggested that there is an essential element of a subjective character to which the name "negligence" is given in a special meaning of that word, *i.e.*, recklessness as to the possibility of unlawful harm. The courts, however, continue to use "gross negligence" as the test in terms which seem to indicate an objective standard arising from the circumstances.

The "Larceny" chapter (pp. 1037–1222) has been completely rewritten, and the whole historical development of the crime is examined. Reference may be made to the following: the necessary attributes of a thing capable of being stolen to make it larcenable at common law; the analysis of possession in relation to larceny; the historical treatment of the place in the law of "larceny by a trick," and in particular the emphasis on its development through *Pear's Case*; the detailed consideration of *Buckmaster* and *Russett*; the critical examination of the unfortunate dicta in *R.* v. *Jones*; the analysis of bailment and conversion by a bailee. As regards larceny under a mistake the editor accepts that in the Middleton situation "for practical purposes the matter must probably be regarded as settled" by the provision in section 1 (2) (i) (*c*) of the Larceny Act, 1916, although he points out the difficulties in the accepted view, but *Ashwell* is severely dealt with (p. 1158 and Appendix 1), and *Hudson* on the larceny point "merits reconsideration." This whole chapter is a major contribution by the new editor and the profession will now have the benefit of his complete logical analysis of the principles and developments of the law, and the acute examination of the leading authorities.

In "Embezzlement" there is a new and useful section dealing with the general principles of embezzlement. In "Fraudulent Conversion" (p. 1289) the editor considers that the statutory provisions do not apply to bailees nor to clerks and servants when they only have custody, but cover only the situation "where the owner of the thing transfers it into the ownership of another for an agreed purpose, whether that other be his servant or an independent person, when an undertaking in the nature of a trust is created." "The effect of the Larceny Act read as a whole is that the words of section 20 (1) (iv) and section 21 apply only to persons to whom ownership of the property has been transferred." "False Pretences" includes relevant cases, an interesting suggestion as to the way the indictment should be framed in the *Button* [1900] 2 Q.B. 597 situation (p. 1408), a discussion of *R.* v. *Leon* (p. 1420) and its difficulties. The editor's argument at p. 1423 in respect of *Leon* has found its way into the judgment in *Clucas* in relation to False Pretences. In "Forgery" the following definition of "document" for the purposes of forgery is submitted—"a writing in any form and on any material which communicates to some person or persons a

human statement whether of fact or fiction" (p. 1452), and *R.* v. *Closs* is analysed in relation to this problem. At p. 1486 there is a discussion of the effect and meaning of the distinction between intent to defraud and intent to deceive in the oft-cited dictum of Buckley J. in *Re London and Globe Finance Corporation* [1903] 1 Ch. 728.

In "Malicious Damage to Property" there is a valuable section on the effect of a claim of right (pp. 1570–92), with an appreciation of the cases turning on "ouster of jurisdiction (p. 1576 and Appendix 2) of justices of the peace"; the submission that "malice" in statutory offences now has the meaning given by Professor Kenny that the offender must either (a) have intended to cause, or (b) have foreseen and taken the risk of causing, the particular kind of harm which he has actually brought about (p. 1592 and Appendix 3); an important new section on the right of a landowner to use force to protect wild game on his land (pp. 1653–65, especially p. 1662) concluding with the submission that *Gott* v. *Measures* [1947] 2 All E.R. 609 was wrongly decided.

There has been an unfortunate printing error whereby the heading "Book 12" in former editions has been omitted with the result that "Attempts, Conspiracy and Incitement," and "Parties to the Commission of Crime" now appear under Part XI under the running heading of "Public Nuisances"! The "Attempts" chapter includes much new material and the editor's suggested practical test of a sufficient *actus reus* for attempt is that the prosecution must prove that the steps taken by the accused must have reached the point when they indicate beyond reasonable doubt what was the end towards which they were directed, *i.e.*, the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime which he is charged with attempting (p. 1790).

With so much to praise in a vast task so well accomplished we may be forgiven for suggesting that the "Libel" and "Nuisance" chapters require modernisation, that we would have welcomed an amplification of the discussion of corporate liability, that perhaps in future editions to reduce size and cost the attempt to cover the whole ground of indictable offences with the consequent necessity of printing large numbers of statutory offences with little comment may be abandoned, and that *Russell* may be kept in the way it has been re-cast by the present editor as essentially *the* book on principle in the criminal law. It is as such that this edition will retain its importance for the profession, not only in this country but in common law systems throughout the world.

A. Ll. A.

The Sale of Goods Act. By Clive M. Schmitthoff, ll.m.(Lond.), ll.d.(Berl.), of Gray's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. xxvii and 251 and (index) 21 pp. 35s. net.]

This is the first volume of a series of practical studies dealing with legal, accounting, administrative and other aspects of modern business, under the title *Business Law and Administration.* The Introduction contains an historical survey, pp. 1–17, and a clear statement of the general principles of the law of sale, and a section on Conflict of Laws, pp. 18–32. Then follow the sections of the Act with detailed commentary on each section, pp. 33–194. The introductory account is linked up with the main part by ample footnote references and the commentaries on the sections are well cross-referenced. The book thus meets the requirements of the lawyer, the business man and the good student. The Appendix, pp. 197–251, contains the Bills of Lading Act, 1855, Factors Act, 1889, Hire Purchase Act, 1939, and the Law Reform (Frustrated Contracts) Act, 1943, each of which is preceded by a detailed explanatory commentary. Some 450 cases are examined, there are verbatim extracts from leading judgments, and the emphasis is on modern cases. A test of several sections shows that the most recent cases are examined in the text and not relegated, without explanation, to a footnote. It is new in its approach, and nothing of importance has been overlooked. The author is to be congratulated upon his skill and industry, and the clear and simple style in which he deals with the contract of sale in relation to its business background.

T. E. L.

Introduction to English Law. By Philip S. James, m.a., of the Inner Temple, Barrister-at-Law, formerly Fellow of Exeter College, Oxford. First edition. [London: Butterworth & Co. (Publishers), Ltd. 1950. xvi and 409 and (index) 21 pp. 12s. 6d. net.]

This book is intended to give first-year students a general view of the law, after the manner of institutional books of Roman Law. The learned author, in his Preface, warns his readers that it is only a "miniature," a map showing the general lie of the land but not its detailed features. It is designed for the "serious student of law in the early stages of his study, whether he be a university student or a candidate for a legal or other professional examination," though it is also hoped that it will prove digestible to the man in the street.

The book is divided into three Parts. Part I, Introductory, includes chapters on The Nature, Classification and Sources of Law, The Administration of the Law (the history and modern organisation of the courts), First Principles, and Personality, Status and Capacity. These 117 pages are simple and straightforward and the beginner will find them useful. Part II, Public Law, includes chapters on the Law of the Constitution (53 pp.), Criminal Law (32 pp.), and the Law of State Responsibility (14 pp.), the last of which is a most useful chapter outlining briefly much of the social legislation of the modern Welfare State, a topic which it is not easy for a student to find briefly and clearly stated elsewhere. Part III, Private Law, has chapters on Contract (54 pp.), Tort (25 pp.), Real and Personal Property (53 and 19 pp.), Trusts (11 pp.), and Succession (25 pp.).

Whilst the book contains a concise discussion of most topics within each branch of law considered, the present writer admits to being very doubtful of the value of such a book as this to " the serious student of law," for whom it is primarily intended. This is not the usual type of introductory book on English Law where the main emphasis is on the development and present organisation of the machinery of the legal system and of the legal profession, with little or no discussion of substantive law. Here the emphasis is reversed and it seems doubtful whether such a preview of the law is necessary before the beginner is capable of attacking the larger textbooks on each topic with which this book neither can, nor intends to, enable him to dispense. The reviewer fears it will not much help the good student and may be too much relied on by the weak student in spite of the learned author's warning in the Preface.

Some points of detail may be mentioned. In Chapter II there is little emphasis on the slow and steady centralisation of justice by various means at the expense of the various systems of courts extant in the twelfth century, some of which are barely mentioned at all. The origin of quarter sessions is attributed to the year 1414 instead of 1363 (36 Edw. 3, st. 1, c. 12) (pp. 39, 57). At pp. 152–5 the impression may be given that the control of expenditure by the House of Commons is, in fact, effective, which is not generally accepted. The discussion of judicial control of the Executive does not refer to an action for a declaration as a possible course (pp. 157–164) nor, under " Citizen and State," is there any mention of powers of entry on private premises without warrant, whether by the police or by officials of many government departments. It seems doubtful whether the brief discussion of various specific crimes is of much value to the serious student (pp. 185–202).

At p. 310 the Fee Simple, Terms of Years and Easements are stated to be the only interests in land capable of subsisting at law, thus excluding the other categories of legal interests in section 1 (2) of the Law of Property Act, 1925, which the reviewer finds students

frequently overlook without any such encouragement to do so. Yet at p. 326 Restrictive Covenants are discussed under the head of Legal Estates and Interests and from a statement at the top of the next page it might appear that they were legal interests. At p. 324 there are stated to be only two forms of Prescription, Lost Modern Grant being omitted. On p. 330 the astonishing statement is made that the legal estate in settled land is conveyed to the settlement trustees by the trust instrument, whilst the vesting deed declares the land to be vested in the tenant for life : the whole of this page seems likely to be most misleading on a topic which students do not find easy. It seems a pity that so much of the section on personal property is taken up with discussion of Patents, Designs, Copyright and Trademarks when so little is said of the forms of personalty more likely to be met with by the beginner. The statement on p. 379 that gifts to charities are exempted from the operation of the rule against Perpetuities surely needs qualification.

Many of these points are clearly due to over-simplification and the need for brevity, but do they not make it possible that such compression may give the beginner a foreshortened view of the legal countryside he is about to explore, and a view that may be all the more difficult to put into correct perspective when he comes to use the more detailed local guidebooks on tort, contract or property to supplement this general survey map?

If it be accepted that there is need of such an introductory book, then it must be stated that the learned author has performed his difficult task well by including a surprising amount of information on many topics in a small volume which is never difficult to read or understand, at a cost which is most reasonable to the purchaser, whilst hardly reflecting the work which must have been entailed in overcoming the difficulties facing the author.

J. W. A. Thornely.

Prideaux's Precedents in Conveyancing. Vol. 2. Twenty-fourth edition. By J. B. Richardson, m.a., ll.b., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. 1951. xc and 1004 and (index) 164 pp. Complete in three volumes 84s. net.]

The appearance of a new edition of this well-known standard work, after an interval of 15 years, will be welcomed among conveyancers; particularly having regard to recent legislation, which has rendered necessary considerable revisions and some new forms. It can be said at once that the material provisions of the Town and Country

Planning Act, 1947, the Agricultural Holdings Act, 1948, and the Patents Act, 1949, which are the principal enactments affecting this volume, have been dealt with in a thoroughly satisfactory manner. Their effect on various branches of conveyancing is concisely but adequately discussed in the introductory notes, and the book contains some very useful new forms relating to the law of town and country planning for insertion in leases and mortgages, as well as revised precedents of agricultural and mining leases. The criticisms which follow are, it is hoped, of a constructive character, and are not meant to imply or cast any doubt as to the value of the work, whose reputation as a leading book of conveyancing precedents is firmly established and which needs no commendation from the present reviewer.

This edition is not quite as up to date as one would expect. The preface is dated February, 1951, but, apart from a reference in the Addenda to the Arbitration Act, 1950, no account appears to have been taken of the legislation of 1950, and even the legislation of 1949 (excepting the Patents Act) is somewhat perfunctorily dealt with. Thus, there is a cursory reference to section 1 of the Landlord and Tenant (Rent Control) Act, 1949, on p. 91, and, according to the Table of Statutes, there is a reference to section 3 on p. 92, but, in fact, this page refers to section 3 of the Act of 1939. There is no reference at all to the important section 2 of the 1949 Act (prohibition of premiums on the grant or assignment of controlled tenancies). On p. 95 it is stated that the Furnished Houses (Rent Control) Act, 1946, has been prolonged to March 31, 1950, whereas in fact it had been prolonged to March 31, 1952, by the Expiring Laws Continuance Act, 1950. On p. 135, there is a reference to section 10 of the Shops Act, 1934, instead of section 38 of the Shops Act, 1950. The National Health Service (Amendment) Act, 1949, is not mentioned in the Table of Statutes, but is referred to on p. 913, where it is stated that this Act does not affect new partnership agreements, a statement which is not entirely accurate (see section 2 of the Act). Incidentally, no attempt has been made to adapt the precedent of articles of partnership between doctors (pp. 912–914) to partnerships between or including doctors who have joined the National Health Service, although the vast majority of new medical partnerships will surely be partnerships of that kind.

Some of the leading precedents in the book are very lengthy. Thus, the full form of an agreement for a lease of a farm (pp. 211–231) extends over 20 pages, and the skeleton precedents for articles of partnership between traders (pp. 904–906) contains 41 clauses. There may well be circumstances in which it is advisable to use these long forms, but it may be doubted whether the ordinary tenant farmer in the one case, or the ordinary small trader in the other (and most partnerships between traders relate to comparatively small businesses carried on by persons of no great education), ever bothers to read the document. At any rate, there must be

many cases in which a short, but carefully drawn, agreement would be preferable. It is suggested that in the next edition there should be included short (but complete) forms of agricultural tenancy agreement, agreement for grazing, and agreement of partnership between traders.

Consideration might also be given to the inclusion in a new edition of one or more of the following forms : forestry lease; agreements relating to service occupancy; lease at a rent varying according to the value of the pound; covenant by lessee not to assign without first offering to surrender the demised premises to the lessor; deed substituting other property for part of the property comprised in a mortgage; service agreement dealing with inventions of employees. Space for these forms might well be found by the elimination of some obsolescent precedents still included, *e.g.*, recitals of pre-1926 mortgages (p. 389 *et seq.*), and legal charge on enfranchised land by a tenant for life to raise money for extinguishing manorial incidents.

H. E. Francis.

Nathan's Equity Through the Cases. Second edition. By O. R. Marshall, m.a.(Cantab), ph.d.(Lond.), of the Inner Temple, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. lx and 522 and (index) 6 pp. 35s. net.]

The first edition was welcomed in Vol. 7, C.L.J. (1940) 290, and the new editor has maintained that high standard of accuracy and clarity. The chapter on Charities has been re-arranged and expanded to double its former size. There are new notes on recovery of money and following the trust property, on trust investments and trustee directors, and a new section on the Limitation Act, 1939. The explanatory comment, formerly in the footnotes, has been conveniently moved and now follows after the cases to which it refers. Eleven new cases have been added and there are abundant references to cases decided since the last edition. The comments are keen and critical, and the whole task of revision has been thoroughly well done.

W. D.

Minimum Standards of Judicial Administration. Edited by Arthur T. Vanderbilt. [The Law Center of New York University, for the National Conference of Judicial Councils. 1949. xxxii and 691 and (index) 59 pp. No price given.]

This is a notable book on judicial administration in the United States. There has been a considerable volume of criticism of the working of the law, principally on defects of procedure and of

personnel. In 1937 a group of eminent judges, lawyers and law professors produced a series of reports containing recommendations on judicial administration, and these were accepted by the American Bar Association in 1938. That Association in 1937 had accepted a report and recommendations on the appointment of judges and the tenure of their offices, and a further report on the enforcement of traffic law was accepted in 1940. It is important that the nature of these recommendations should be appreciated: they do not necessarily amount to what is thought to be the best, but are the "minimum" and the "practical." This can best be seen in the recommendations about appointment of judges. It is obvious that informed legal opinion is in favour of judges being appointed and holding office during good behaviour instead of the system of direct popular election and tenure until the next election day, but a complete abandonment of election is too much to expect (at least at one bite). The recommendation is for executive appointment from a selected list, perhaps with confirmation by the legislative body and re-appointment periodically or submission to a popular vote without any opposing candidate. Thus "practical" means "practical politics," proposals that really have a reasonable chance of getting support and being adopted in different jurisdictions. These reports are printed as Appendices, where they take well over a hundred pages.

Now this book is a great stocktaking. What has been the effect of these recommendations? What progress has been made? And how does each of the 48 States stand in all these matters? Obviously such an inquiry needs a large team. It was entrusted by the American Bar Association to its Section of Judicial Administration and the Junior Bar Conference, and received the help of the National Conference of Judicial Councils and a large number of individuals. Considerable organisation and a great deal of work have been required. It is very difficult to marshal and present such a large body of material. A special feature of the book is the graphic representation by maps, of which there are 62. Thus one can take a subject and the main grouping of the ways in which it may be handled, and then by looking at a map see how the various States deal with the matter. It is also easy to compare one State with another, and, if one likes, make a score of their respective stages on the upward path.

This book ought to be well received in this country. It is a mine of information, and it shows what can be done if the legal profession sets its mind on reform. Indeed, to an Englishman the most striking thing of all is that both the original drive and the move for this survey come from the legal profession. Our legal profession has had more of a hand in law reform than is generally supposed, but it has never sponsored a survey on this scale.

R. M. Jackson.

The Reshaping of French Democracy. By Gordon Wright. [London: Methuen. 1950. xi and 288 and (index) 10 pp. 15s. net.]

This book, written by a young American professor who worked in the Paris Embassy of the United States just after the end of the war, has already won recognition as an authoritative study of the constitution-making period of the Fourth French Republic. It covers the period of the Provisional Government of General de Gaulle, of the two Constituent Assemblies of 1945–6, and the first phase of the new Constitution in 1947. Although inevitably concerned with the *minutiae* of the draft constitutions and with the party haggling which eventually produced the patchwork system of compromises which shaped the Fourth Republic, it also deals in a penetrating and comprehensive way with the political forces at work in France after liberation. It is, indeed, almost a book for the historian and the political scientist rather than for the constitutional lawyer in the narrowest sense: though not least of its many virtues is that it reveals the inter-relation of economic and political forces, and the outcome of their interaction in constitutional forms.

It is too often forgotten that of the two main types of constitution between which Frenchmen thought they had to choose in 1946, the presidential type and the parliamentary, the former had immediately previously been tried in the contrasting forms of the Vichy State and the Provisional Government of General de Gaulle. If they turned back to the parliamentary type, so reminiscent of the Third Republic, after only a year previously rejecting the Third Republic by referendum, it was in large measure due to disillusionment with the presidential type. De Gaulle had done much to restore France's "greatness," in the diplomatic and military sense in which he conceived it, but he had done little to remedy the basic economic difficulties of which Frenchmen were then most acutely aware. There was comfort and reassurance in the "reversion to type" which has continued ever since to assimilate the Fourth Republic to the Third. The supreme merit of Mr. Wright's book is that it explains this process. It stands up well to the most crucial test possible for a book on contemporary history: it retains its value and its accuracy of interpretation three years after it was written.

David Thompson.

The British Year Book of International Law, 1950. Vol. XXVII. Edited by Professor H. Lauterpacht. Royal Institute of International Affairs. [Geoffrey Cumberlege (Oxford University Press). 1951. viii and 522 and (index) 13 pp. 63s.]

The strength of the *British Year Book of International Law* has always been that, appearing only once a year, it can afford to

eschew articles of merely ephemeral interest and to concentrate on the publication of scholarly and substantial monographs which are genuine contributions to the subject. This excellent number fully maintains that tradition. All the articles will repay study and many of them are the fruits of major pieces of research. In this notice it is possible to give only a brief catalogue of the rich fare provided.

Mr. G. G. Fitzmaurice has collected and classified statements of general legal principle from the decisions of the International Court of Justice, thus continuing the series of similar articles begun by Sir Eric Beckett : this is a valuable guide to the jurisprudence of the Court, and strikingly illustrates the importance of the contribution already made by the Court to the development of the law. Miss F. Morgenstern writes on Judicial Practice and the Supremacy of International Law : a scholarly and important reassessment of the relationship of international municipal law. Mr. O'Connell tackles the difficult question of the position of economic concessions in the law of State succession, using incidentally some newly available Law Officer's Opinions which throw some doubt on the attitude of the Transvaal Concessions Commission. Mr. I. M. Sinclair, in an interesting little study, throws new light on the curious artificialities of the rule of nationality of claims. There is a learned commentary on the European Convention for the Protection of Human Rights by Dr. A. H. Robertson. Mr. Clive Parry makes a thorough and lawyer-like analysis of the materials and documents concerning the legal nature of the Trusteeship Agreements. Mr. G. P. Barton's discussion of the immunity of foreign armed forces from criminal jurisdiction is a part of a general study he has made into the immunities and privileges of foreign armed forces, and complementary to his article in the *Year Book* for 1949. Major Richard R. Baxter of the United States Army gives a most able reassessment of the legal principles governing the duty of obedience of the belligerent occupants. Mr. S. Rosenne writes on the effect of change of sovereignty upon municipal law, with particular reference to the post-war instances of newly emancipated independent States. Mr. C. J. Hamson, a member of the Somervell Committee on State Immunities, describes the practice of French courts in this matter. Mr. D. H. N. Johnson provides a careful analysis of acquisitive prescription in international law. Mr. J. E. S. Fawcett has a very timely article on some foreign effects of nationalisation of property. Lastly, there is an important and authoritative article by the editor on sovereignty over submarine areas.

There are also the usual notes, reports of English decisions and book reviews.

R. Y. J.

Higgins and Colombos on The International Law of the Sea. Second revised edition by C. JOHN COLOMBOS, LL.D., etc. [London: Longmans, Green & Co., Ltd. 1951. xiii and 678 pp. 50s. net.]

THIS is a revised edition of the well-known book first published in 1943. It consists of two distinct parts dealing with the International Law of the Sea in Time of Peace and War respectively. Part I, which is devoted to "Peace," traces the development of the International Law of the Sea from its beginnings to the numerous codes, statutes and charters of today. Several chapters deal with the law appertaining to specific maritime regions, such as territorial waters, straits and so forth. The relative status of warships and merchant ships, international navigational regulations and a number of specific subjects such as embargo and peace-time reprisals are treated in detail.

The "War" part of the book begins with the general rules of naval warfare, and a review of the relative positions of belligerents and neutrals. At the end the author reviews the more recent pacts, treaties and charters. He departs from the detached style normally encountered in books of this kind by the inclusion of a number of vigorous denunciations of the "Axis" methods of naval warfare and their frequent breaches of the rules of International Law.

The subject-matter has been brought up to date, and covers recent pacts such as the Brussels Treaty, 1948, and the North Atlantic Treaty, 1949. It is, therefore, a little surprising that no mention is made of the effects of the Crown Proceedings Act, 1947, on such matters as salvage and limitation of liability.

In view of the numerous imperfections of the machinery of International Law, which this book very effectively points out, it would be most helpful if the learned author were to include, in future editions, his own proposals as to how defects such as the lack of sanctions, the frequent failure on the part of signatories to ratify treaties, and the diverging national interpretations of many basic rules, could be remedied.

The experienced practitioner will find in this book references to almost every aspect of International Sea Law, and at the same time the treatment of the subject is sufficiently concise and clear to enable others interested in this topic to read the book without difficulty. It is a most valuable asset for any lawyer's library.

D. H. HENE.

The Conflict of Laws: A Comparative Study. By Ernst Rabel. Vol. 3. Special Obligations, Modification and Discharge of Obligations. Michigan University Press. [London: Geoffrey Cumberlege. 1950. clvi and 610 pp. £5 net.]

In the third volume of his monumental treatise Professor Rabel reaches the stage where the discussion of general problems of status and of the much debated questions arising in contract and tort gives way to the treatment of individual contracts, quasi-contracts, assignments, set-off, counterclaims and statutes of limitation. This is a field where monographs have been predominant hitherto and where a balanced critical survey was much needed. Professor Rabel has now provided such a survey which will long remain unsurpassed for its detailed information, breadth of vision, practical experience and constructive thought. It is not always easy to follow the author's argument, and it may be possible to disagree with him on individual points, but students of the conflict of laws and of commercial law today and in future generations will owe a constant debt of gratitude to Professor Rabel for his magnificent enterprise.

K. L.

Cases on Private International Law. By J. H. C. Morris, D.C.L. Second edition. [London: Geoffrey Cumberlege (Oxford University Press). 1951. xxvii and 417 pp. 30s. net.]

The casebook as an instrument of legal instruction may serve one of two purposes. It may be designed to supply factual information in conjunction with a textbook, or it may be intended to take the place of the latter. According to its purpose, it must tend to be either comprehensive or selective. Moreover, if it is to take the place of a textbook, its value will be enhanced and may, in time to come, depend upon a commentary which links up the disjointed material. Dr. Morris has chosen the casebook as a means of systematic exposition, and the appearance of a second edition proves the success of his experiment. The choice of illustrations is admirable, and the connecting text always bears the mark of his original and stimulating thought. It gives the book a certain controversial character which is normally absent in works of this kind, but which cannot be avoided altogether in Private International Law even by the most orthodox writers. Dr. Morris is not orthodox, and some of the comments, such as those on contract, tort and immovables may raise doubts which cannot be answered in the course of a review. But no reader can lay this book aside without

the conviction that he has been given a thorough and thought-provoking course of instruction covering the entire field of Private International Law.

K. L.

The Formation and Annulment of Marriage. By J. Jackson, M.A., LL.B., with a Foreword by the Right Hon. Lord Justice Hodson. [London: Sweet & Maxwell, Ltd. 1951. xxvii and 324 pp. 42s. net.]

In this comprehensive book the formation and annulment of marriage is closely examined from the point of view of the legal historian, the practising lawyer and the student of private international law. As an attempt to present a complete survey of the law, past and present, in England and in the Commonwealth, this work deserves nothing but praise. Nobody who turns to its pages for information will fail to find his reward. But it may be doubted whether the observations of the Bench on the work of its predecessors in office are the best source of legal history. Again long extracts from judgments, not as illustrations but as part of the text, frequently tend to obscure the fundamental issues and are not always an effective substitute for analysis and formulation. The author's own observations are often acute, but it is not always possible to accept his suggestions. The chapter on *De Reneville* v. *De Reneville*, in particular, serves rather to increase than to resolve the controversy which centres around this decision. Nevertheless, as a practical guide this book should prove to be of great value.

K. L.

A Guide to Compulsory Purchase and Compensation. Second edition. By R. D. Stewart-Brown, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1951. xiii and 103 pp. 10s. 6d. net.]

This little book first appeared in 1948 as one of the series of *Current Law Guides*. It has now been revised and given a cloth binding. The law of compulsory acquisition is in an appalling mess: there is now no dearth of large compendious textbooks in which to look up the details of a particular subject-matter, but these are not intelligible unless one has first mastered the elements of the subject. For preliminary reading there is nothing better than Mr. Stewart-Brown's book. The new edition has had substantial alterations to meet the creation of the Lands Tribunal, but otherwise it has received only minor additions and corrections. There

is no indication of the date to which it has been corrected, and the Appendices on Statutes must be used with care. At p. 93 the Prison Act, 1865, is cited as the authority for acquisition of land for prisons and similar purposes : this was repealed by the Criminal Justice Act, 1948, which applies the Acquisition of Land (Authorisation Procedure) Act, 1946. But only those who delve in this part of the law have any idea how easy it is to make mistakes. Students have used this book since it first appeared and they have found it a great help. The new edition is welcome.

R. M. J.

The Justices' Handbook. Second edition. By J. P. Eddy, K.C. [London: Stevens & Sons, Ltd. 1951. xiii and 224 pp. 12s. 6d. net.]

A Magistrate's Handbook. Second edition. By His Honour Sir Ronald Bosanquet, K.C. and A. J. F. Wrottesley, M.A. [Hadleigh, Essex: The Thames Bank Publishing Co., Ltd. 1951. 281 pp. 12s. 6d. net.]

Wigram's Justices' Note-Book. Fifteenth edition. By Edward Hooton, M.A., LL.B. [London: Stevens & Sons, Ltd. 1951. xxxiii and 428 pp. 37s. 6d. net.]

Clarke Hall and Morrison on Children. Fourth edition. By A. C. L. Morrison, C.B.E. and L. G. Banwell. [London: Butterworth & Co. (Publishers), Ltd. 1951. xxxvi and 615 and (index) 27 pp. 75s. net.]

All these are new editions of books that have established reputations in their respective fields.

The first two are primarily books for newly appointed justices, who can be safely advised to read straight through either or both of them and thereby learn the elements of performing the duties of their office.

Wigram has opening chapters on jurisdiction and procedure but it is more a reference book for justices who know something of their work. The main part is arranged alphabetically so that a justice can rapidly find information about an offence, procedure or whatever it is that he wants to know about. Reference to statutes and cases are given, and solicitors may find *Wigram* useful, for though it cannot be a substitute for the vast sprawl of *Stone* it is a most convenient guide in realms where it is often hard to see the wood for the trees.

Clarke Hall & Morrison is, of course, a work of authority; there is nothing else at all comparable. The new edition contains the Children Act, 1948, and the Nurseries, etc., Act, 1948, annotated

by M. M. Wells and revised by the editors in collaboration with Joan D. Cole, so that it is now the standard book not only for those concerned with juvenile courts but also for children's officers and others. Most of those who have been using *Clarke Hall and Morrison* (and everyone of them will welcome this new edition) have watched the growth of this part of the law and know the bearing of one topic upon another. A younger generation needs a little more help, and the editors might well consider beginning the next edition with a general introduction.

R. M. J.

Practical Points on Planning Law. Edited by HAROLD J. BROWN, LL.M., D.P.A., L.A.M.T.P.I., Barrister-at-Law, Assistant Editor of the *Journal of Planning Law*. [London: Sweet & Maxwell, Ltd. 1951. xiv and 284 and (index) 6 pp. 15s. net.]

IT is inevitable that an Act of the length and complexity of the Town and Country Planning Act, 1947, should have given rise to numerous problems in its application to facts. The solution of these problems became even more difficult when one remembers that many of the answers are to be found not in the Act itself, nor in the Law Reports, but in numerous regulations made under powers delegated by the Act, or perhaps only at the offices of the Minister or the Central Land Board. This book is a collection of nearly 300 opinions given by an unnamed band of experts to legal and other practitioners upon problems which have actually arisen in practice. Some of these opinions have already been published as "Practical Points" in the *Journal of Planning Law*: the majority we are told, had not appeared in print until this book was published early in 1951.

Subject to certain limitations, which are in no sense the fault of the learned authors or editor, this is a most useful book, which might well find its way to the bookshelf of any professional man, whatever his particular calling, who is called upon to deal with planning problems. Regulations are apt to be modified or revoked: and it may be disquieting to many to note how often the answer is in effect, if not in so many words, "Ask the Central Land Board," or is to be sought only in Practice Notes issued by that body. But, these considerations apart, a practitioner, be he lawyer or valuer, who uses this book, will surely get a great deal of useful guidance from it.

For the work of the learned editor there can be nothing but praise. The classification of the answers under the various headings is admirable and cross-references are frequent. Many answers have also been amplified by references to the *Journal of Planning Law*: and in several cases references are given to subsequent decisions of the Minister upon the same point.

Although Mr. Brown has spared no pains in an endeavour to bring the various answers up to date, he cannot, as editor, be held responsible for the views expressed. He has, however, made available to harassed practitioners a well-planned reference book which will guide them towards the solution of many vexatious problems.

D. Macintyre.

Trade Union Law. By Norman A. Citrine, ll.b.(Lond.), Solicitor of the Supreme Court. [London: Stevens & Sons, Ltd. 1950. xliv and 700 pp. £2 5s. net.]

This book was originally intended to be a fourth edition of *Slesser & Baker on Trade Union Law.* The last edition of *Slesser & Baker* appeared in 1927, and it is not surprising that during the course of preparation the author found that an entirely new work was taking shape. In consequence, with Sir Henry Slesser's approval, this book appears not as a new edition of *Slesser & Baker* but as a new work following the same general lines. In a Foreword Lord Jowitt commends the book both to the legal profession and to officers and members of trade unions throughout the country. There is no doubt that it will take its place as the standard work on this important subject.

A. L. F.

A Comparative Study of Anglo-American and Latin-American Law. By Phanor J. Eder. New York University Press. [London: Geoffrey Cumberlege (Oxford University Press). 1950. xii and 160 and (bibliographies) 91 and (index) 6 pp. 48s. net.]

The author was born in Columbia of American parents. Since 1904 he has been a member of the New York Bar, his professional practice is international, and he is the dean of the Inter-American Bar. The book is founded on a course of lectures given to the Inter-American Law Institute and is sponsored by the Institute. It covers a very wide field, Sources, Unity and Supremacy of Law, Torts, Equity, Trusts and Future Interests, General Survey and Comparative Law. There is a comprehensive bibliography of publications in English and in foreign languages. Owing to historical and psychological factors the Latin and the common law systems differ in their outlook and method of approach, the former is more academic and logical tending to prefer certainty to justice; the latter prefers experience to abstract reasoning and attempts to realise a working compromise between certainty and justice. Both often attain the same results by a different approach. Space does

not permit a detailed account, but this book is a real contribution to the study of comparative law.

M. S. S.

Negligence Without Fault. By Albert A. Ehrenzweig. [Berkeley and Los Angeles: University of California Press. London: Cambridge University Press. 1951. 95 pp. $2.00 net.]

The title of this book may mislead readers. "Fault without Negligence" might have been a more appropriate description of its subject-matter, for the author is concerned with the numerous tendencies to establish liability for the tort of negligence where fault can only be established constructively or vicariously and where no moral blame attaches to the defendant. *Res ipsa loquitur, respondeat superior,* liability for animals, dangerous structures and dangerous enterprises are examined. The conclusion is reached that any liabilities thereunder "resemble liabilities without fault in extending . . . to harm caused by non-reprehensible conduct and . . . to harm not foreseeable by the person causing it." "Anticipation of harm at the time of the start of the activity rather than [at] the time of the injurious conduct determines the scope of liability." The author pleads for the recognition of a general category of liability for harm caused by "hazardous but lawful enterprise activities" which can be justly imputed to the promoter as being reasonably calculable and insurable by him. Such liabilty may even operate concurrently with liability for fault.

This brief summary must suffice to indicate the author's broad approach which invites a re-examination of traditional thought and to recommend his work as a point of departure.

K. L.

Russia and the United States. Second edition. By Professor P. A. Sorokin. (Published under the auspices of the London Institute of World Affairs.) [London: Stevens & Sons, Ltd. 1950. xi and 209 and (index) 5 pp. 12s. 6d. net.]

According to the Preface to the first edition, this book is based on some lectures delivered by the author in the United States. It is evident from the book's racy style and a tendency towards oversimplification that these lectures were not delivered to academic audiences. Professor Sorokin's thesis is that the American and Russian ways of life are not incompatible and that there exists a strong basis for mutual understanding between the two countries. The bulk of material in support of this thesis he takes from prerevolutionary Russia about which he is well qualified to write,

having held several important posts before he left his native country for the U.S.A. in 1922. This is a stimulating book, but it may be doubted whether Professor Sorokin has given sufficient weight in this present edition to the progressive deterioration in Russo-American relations since 1945. A correction should be made of the statement at p. 55 that justices of the peace are elected in England.

E. G. L.

Corporation Trust and Company. By C. A. Cooke. [Manchester University Press. 1951. 195 and (index) 6 pp. 15s. net.]

This is a scholarly and fascinating essay which will be of great value to students of English legal and social history, although its interest is by no means confined to the specialist. Dr. Cooke investigates the evolution of the modern company and traces the legal, social and economic forces which have moulded it. His essay is a brilliant distillation of a great deal of learning and research. The Manchester University Press deserves congratulation on a very well produced book.

E. G. L.

The Technique of Advocacy. By John H. Munkman, ll.b., of the Middle Temple and North-Eastern Circuit, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. xiv and 173 pp. 17s. 6d. net.]

This is a book of outstanding merit for it deals with the whole field of advocacy in a logical and objective manner with particular reference to the technique of cross-examination. It is new in every way, the approach is analytical; it is based on the "Carson-Hastings-Birkett" style rather than the remote old-fashioned rhetoric of the "Lincoln-Scarlett" variety, and is free from exaggerated hero worship. It is learned, lively and critical and delightfully written. It gives a clear account of the technique of interrogation and the fallacies of testimony; examination in chief; the aims and limits of cross-examination, in detail, its preparation and planning; legal proof and the formulation of arguments; the construction and arrangement of the speeches and general strategy and tactics. There are quotations from notable cross-examinations, and the points are brought home by carefully chosen examples from the methods of distinguished advocates. Nothing has been left undone in providing the beginner with practical instruction and encouragement, and even the "old hand" will find it stimulating and instructive.

A. P. D.

The Oxford Circuit. By His Honour Sir Roland Bosanquet, K.C. [Hadleigh: The Thames Bank Publishing Co., Ltd. 1951. ix and 118 pp. 8s. 6d. net.]

This delightfully written book of legal reminiscences covers a much wider field than its title would imply. It starts in Cambridge in 1887 when the author, as a Trinity undergraduate "by an odd mistake called on the Judge of Assize Mr. Justice Denman," and later decided to read for the Law Tripos under Dr. Bond (later Master of Trinity Hall). It gives an account of the famous "Spinning House Case" and some remarkable and hitherto unknown disclosures in connection with the *Armstrong Case.* The reason why the Bench has so often been recruited from rowing men, while few cricketers of note have attained it, may be found at pp. 46–47. Though primarily concerned with the Oxford Circuit a great deal is said of the courts and judges in London, and there is a fund of good stories. The *fortes* and *foibles* of Coleridge C.J., of Hawkins, Field and Kekewich JJ., and of Lord Halsbury are amusingly related, and there is much entertaining information on a section of legal life which is not generally known.

T. E. L.

A Prospect of Gray's Inn. By Francis Cowper, of Gray's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. xiii and 178 and (index) 9 pp. 30s. net.]

This is a delightful and scholarly account of the history of Gray's Inn from its earliest beginnings, "an irregular group of ancient buildings enclosing a single quadrangle," to the present day. An enormous mass of varied sources from 1569 onwards has been used and condensed so as to give a living picture of the Inn at various periods of its development. It combines architecture, biography and the changing structure of the legal profession. It outlines the building and courts that succeeded each other, and gives a vivid account of life with the lawyers, their Readings and Moots, their masques and revels, the religious crises of the Reformation, the strife of the Civil War, the return to the "ancient mould" in the Restoration, the calm of the eighteenth century, the vicissitudes of the nineteenth and the great revival of the twentieth century. Then follows a description of the destruction of the war, and the Epilogue deals with its resurrection and the completion of the new Hall. There are seven illustrations and three Appendices giving the Treasurers from 1901–1950, the Benchers of 1951 and the links with the United States. It is a social history of the Inn and of the times, the changing manner of life and the contribution of Gray's to history. The book is full of interesting information, and the

author "has displayed a sure touch and a filial piety which only a devoted son of the Inn could show."

T. E. L.

Butterworth's Costs in Civil Litigation and Non-Litigious Work. In Two Volumes. Edited by B. P. Treagus, Principal Clerk, Supreme Court Taxing Office, and H. J. C. Rainbird, of the Supreme Court Taxing Office, Royal Courts of Justice. [London: Butterworth & Co. (Publishers), Ltd. 1951. xiv and 1709 and (tables of cases and statutes) 70 and (index) 189 pp. £7 7s. per set net.]

The authors of this monumental treatise, both of the Taxing Office, have been assisted by a team of contributors possessing expert practical knowledge in their respective branches of this intricate subject. This, coupled with a note of welcome by the Rt. Hon. The Master of the Rolls, and a Foreword by the Chief Taxing Master ensures it a "clean bill" and an unofficial recognition of authority. A prodigious amount of labour has gone into this compilation. In its planning, division of topics, citation of up-to-date authorities, alternative forms, variation of type, cross references, table of cases, statutes, a comprehensive and complete index with heavier type for the relevant pages, every form of ingenuity has been employed to simplify the task of the solicitor or costs clerk in preparing a model bill of costs, on every civil matter, litigious or non-litigious. Each section contains the relevant legislation, notes, orders, directions and tables of fees, annotated with explanatory notes and references to cases in smaller type. About 400 precedents are carefully set out in the order of progress which an action or matter normally takes, with subheadings in heavier type as each stage is reached, and they cover every possible form of proceeding. There are full details of every conceivable charge, a useful table of counsel's fees and their clerks' fees, p. 161, and shorthand writers' fees, p. 169. Part I is mainly concerned with the High Court, Bankruptcy, Companies, Court of Protection, Palatine Court, Crown Office, Probate, Inland Revenue Accounts, Divorce and Admiralty. Part II deals with the Privy Council, House of Lords, House of Commons, County Court, Conveyancing, Ecclesiastical Courts, Arbitration and Legal Tribunals. It also contains a detailed account of the Solicitors Acts, 1932–50, and the Legal Aid Act, 1949, the General Regulations, 1950, with precedents of bills and up-to-date notes on Legal Aid Costs down to June 1, 1951. The clarity, detail and comprehensiveness of this work make it indispensable on any question of costs—it is a standard authority.

N. D. and B. J.

The Leasehold Property (Temporary Provisions) Act, 1951. By T. J. Sophian, of the Inner Temple, Barrister-at-Law, and G. E. Llewelyn Thomas, of the Middle Temple, Barrister-at-Law. [London: Sir Isaac Pitman & Sons, Ltd. 1951. xii and 82 and (index) 2 pp. 12s. 6d. net.]

This Act is alleged to be temporary, but is likely to follow the precedent of the Rent Restrictions Acts. It does so already, for it is a complicated addition to the statutory confusion imposed upon the relation of landlord and tenant. The text of the Act is set out with a full explanatory general note to each section followed by notes on particular words and phrases appearing in the section. The notes are thorough, particularly those on sections 7, 12 and 14; problems are discussed and suggestions are made for their practical solution. The text of the Landlord and Tenant Act, 1927, and the Leasehold Property (Temporary Provisions) (Shops) Regulations, 1951, are set out in the Appendix. The book is a useful guide to the numerous and complicated problems which arise out of the Act.

R. F.

The Elements of Income Tax Law. By C. N. Beattie, ll.b., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. xxxv and 179 and (index) 10 pp. 30s. net.]

This new book is an outline of the underlying legal principles of income tax law written for the law student. It deals with the lawyer's task of applying general principles to particular situations, but the accountant's problem—the elucidation of questions of account, "the mathematics of tax" are not overlooked. It emphasises the fact that tax problems can only be considered after general principles of law have been applied in order to ascertain the precise nature of the rights and interests of the person concerned. The approach is practical, it concentrates on the student's requirements, but the copious citation of authorities in the footnotes is a concession to the practitioner. The introductory chapter on the history, sources, assessment and administration is admirable, and the whole of this complex topic is explained in a clear and comprehensive way. It is up to date and very well done.

W. D.

Phillips' Practice of the Divorce Division. Fourth edition. By E. E. Spicer, m.a., ll.b. [London: The Solicitors' Law Stationery Society, Ltd. 1951. lxviii and 680 and (index) 75 pp. 84s. net.]

All the editions of this book, of which the first appeared in 1929, have presented in a concise manner the practice and procedure of the Divorce Division in matrimonial causes, and were designed for the practitioner. Momentous changes in law and procedure have been made since the edition of 1939, and, although the main structure is retained, this is in substance a new book. Fifteen chapters have now become 22, new material, rewriting, rearrangement and enlargement are apparent everywhere. Miss Spicer, as Supervising Secretary to the Law Society's Divorce Department, has unrivalled knowledge and experience of the subject and has made the book more useful than ever. A new feature is the outline of the law as to jurisdiction, grounds for, bars and defences to relief and a clear account of legal aid at pp. 62–71. Then follow in logical sequence the stages of a cause from beginning to end. Adequate instruction is given on the drafting of petitions and other pleadings, and there are over two hundred precedents of forms. The work is complete and accurate, practical problems are tackled and clarified; everything has been done to simplify the task of the practitioner.

R. F.

Woolley's Death Duties. Seventh edition. By John H. Munkman, ll.b., of the Middle Temple, Barrister-at-Law. [London: The Solicitors' Law Stationery Society, Ltd. 1950. xxiii and 251 pp. 27s. 6d. net.]

A Practical Epitome of the Death Duties. Second edition. By David Harrison, ll.d., of the Estate Duty Office, London. Consulting Editor for Scots Law, R. A. Grieve, b.l., of the Estate Duty Office, Edinburgh. [London: Sweet & Maxwell, Ltd. 1951. xx and 436 pp. 27s. 6d. net.]

Both these books possess two outstanding merits. They are brief; and they are readable.

The present edition of *Woolley*, as pointed out by the learned editor in his Foreword, is in fact a new book. It is also a very good book. The arrangement is excellent, and is well designed to bring into relief the broad principles of the subject. The text is no mere collection of the statutory rules, and is often illuminated by citations from judgments and by illustrations from decided and hypothetical cases. A special feature of the book are the last three

chapters (XVI to XVIII), which deal with avoidance of duty in connection with dispositions *inter vivos* and by will, and conveyancing practice in relation to duties. Chapter XVI should, perhaps, contain some reference to discretionary trusts, which are often resorted to nowadays as a means of reducing the incidence of duty over a comparatively long period defined by reference to the perpetuity rule. Unlike most other books on this subject, *Woolley* does not contain the text of the relevant statutes. No doubt, this omission has the advantage of reducing the size and the price of the book; but it is thought that its usefulness and its appeal to practitioners would be much increased by the inclusion in an Appendix of the relevant legislation.

Harrison is also very good value. The explanatory text, which covers only 181 pages, is a remarkably compendious and clear statement of the law. The treatment of the provisions of the Finance Act, 1894, relating to property passing and deemed to pass on death, on which the whole subject hinges, is particularly good. The text is supplemented by many useful footnotes. The Appendices contain all the relevant statutes, statutory instruments, and conventions giving double taxation relief. It is a book which can be thoroughly recommended.

H. E. Francis.

Current Law Year Book, 1950. Edited by Clifford Walsh, ll.b. General Editor: John Burke. [London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1951. cc and 4439 paras. and (index) 33 pp. £2 2s. net.]

This number follows the lay-out of those for the previous three years. There is an increase of 162 in the numbered paragraphs due mostly to a sharper division of subject-matter which should make it easier to find a point which is being sought. The fall in the number of Statutory Instruments as compared with 1949 (324) is unhappily off-set by the fresh sources of *quasi* case-law—decisions of nearly a dozen administrative tribunals. The editors have also restored the "Outline of the Law" which last appeared in the 1947 number, and this should be useful in directing a student's attention to recent developments in his field of study. Might we say again that we should like to see "C.L.J." in the Table of Abbreviations.

T. C T.

Rent and Mortgage Interest Restrictions. By the Editors of "Law Notes." Twenty-second edition. [London: "Law Notes" Publishing Offices. 1951. xlii and 478 and (index) 34 pp. 32s. 6d. net.]

The passing of the Landlord and Tenant (Rent Control) Act, 1949, made desirable a new edition of this invaluable book. The silt of case law arises on the Rent Acts with an almost overwhelming rapidity. The incorporation of new case law and the 1949 Act with the regulations made under it has increased the size of this edition by about a quarter as compared with its predecessor. Mercifully the book is still easily stowed in a brief case, which is no mean attribute when it is so frequently an indispensable companion. How long it will be possible to keep it within reasonable dimensions must be a matter of some doubt as the Leasehold Property (Temporary Provisions) Act, 1951, went into the statute book too late for inclusion in this edition and there is no certainty that new patches will not be added to the quilt by the legislature in the near future. In the meantime the never ending work of interpretation of the Rent Acts goes on in the courts and not infrequently long-standing and widely held opinions are suddenly demolished. It will be noted that the observations at p. 105 on the exposition "tenant" as defined in section 12 (1) (*g*) of the 1920 Act require revision in the light of the decision of the House of Lords in *Moodie* v. *Hosegood* [1951] 2 All E.R. 582.

E. G. L.

Books also received :—

The Rent Acts. Sixth edition. By R. E. Megarry, m.a., ll.b., of Lincoln's Inn, Barrister-at-Law. London : Stevens & Sons, Ltd. 1951. lxxvi and 611 and (index) 23 pp. (50s. net.)—Up-to-dateness, accuracy, scholarship, completeness and clarity, excellent indexing and copious cross-references coupled with a reasoned solution of problems yet to arise are the great merits of this book. The present edition is over twice the size of the fourth. Over 350 new cases are incorporated, the Table of Contents has been expanded to indicate the arrangement of the text; a great deal of it has been rewritten, rearranged and sub-divided; with warning references to the Leasehold Property (Temporary Provisions) Bill, which has since become the Act of 1951. It brings the law down to April 1, 1951.

Hill's Complete Law of Housing. Second Supplement to the Fourth edition. By D. P. Kerrigan, b.l. and R. G. C. Davidson, ll.b. London : Butterworth & Co. (Publishers), Ltd., Shaw &

Sons, Ltd. 1951. xxiv and 264 pp. Main work and Supplement 60s., Supplement alone (30s. net.) The fourth edition of *Hill* is dated 1947, and there has been much legislation and some important decisions since that edition was written. The second Supplement states the law as on June 30, 1951, and the comprehensiveness and accuracy of the work appear to be well maintained.

Emmet's Notes on Perusing Titles and on Practical Conveyancing. First Supplement to the Thirteenth edition. By J. Gilchrist Smith, ll.m., Solicitor (Honours). London: The Solicitors' Law Stationery Society, Ltd. 1951. xvi and 70 pp. (7s. 6d. net. Main Work and Supplement £6 10s. net.)—This Supplement contains changes in the law up to the end of 1950, with some amendments and improvement to the text. The *Addenda* to the first and second volume and all the new law are conveniently brought together in the Noter-Up.

Underhill's Law relating to Trusts and Trustees. Supplement to the Tenth edition. By M. M. Wells, of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. xii and 12 pp. (Main Work and Supplement, 77s. 6d. net; Supplement alone, 5s. net.)—This Supplement to the edition of 1950 covers those changes which have occurred up to September 1, 1951.

Ranking, Spicer and Pegler's Executorship Law and Accounts. Eighteenth edition. By H. A. R. J. Wilson, f.c.a., f.s.a.a. London: Sir Isaac Pitman & Sons, Ltd. 1951. xxxi and 427 and (index) 15 pp. (30s. net.)—Primarily designed for the student and practising accountants, this very reasonably priced book should be found extremely useful by law students, and for quick reference it can be recommended to the lawyer. Five-sixths of it is devoted to the law, which is set out in a clear, accurate and practical manner with a wealth of explanatory illustrations, particularly in the chapter on Apportionment. Death duties occupy about 100 pages, and a new chapter on Trusts and Trustees, by Mr. C. N. Beattie, ll.b., Barrister-at-Law, has been added.

Handbook of Child Law. By John Stevenson, Late Chief Superintendent of School Attendance Officers and Child Employment Inspectors of the Birmingham Education Authority, and Laurence Hague, Senior Administrative Assistant, City of Birmingham Education Committee. London: Sir Isaac Pitman & Sons, Ltd. 1952. xvii and 470 and (index) 63 pp. (40s. net.)—This is, in substance, the fourth edition of the "Handbook for School Attendance Officers" completely revised and brought up to date. The subject is treated under five sections, the Education Acts, the Children and Young Persons Acts, the Children Act, 1950, Children Life Protection and Adoption, and Miscellaneous (Guardianship, Legitimacy, Nurseries and Child Minders Regulation Act, 1948, etc.).

The English and Welsh Boroughs. By W. Barnard Faraday, of Gray's Inn, Barrister-at-Law, Recorder of Barnstaple and Bideford. Hadleigh : The Thames Bank Publishing Co., Ltd. 1951. v and 100 and (index) 11 pp. (10s. net.)—This very readable and interesting little book is a most informative account of the main stages in the growth of the municipal and parliamentary boroughs from their earliest days to modern times. The methods of acquiring borough rights and privileges are explained; sound reasons are given for the view that the English borough is of Roman or Keltic foundation and the influence of the borough on ideas of liberty and collective responsibility is made clear.

The Trustees' Handbook. By J. A. R. Finlay, m.a., of the Middle Temple, Barrister-at-Law. London : Sweet & Maxwell, Ltd. 1951. ix and 169 and (index) 3 pp. (10s. 6d. net.)—The publishers state that its main object is to "provide for the benefit of persons who are appointed trustees, a short and simple outline of their powers and duties, rights and obligations." It is a clear and accurate outline with substantial verbatim reproductions of the Trustee Act, 1925, and within the space at his disposal the author has done well with an extremely difficult task. It is believed that the lay trustee would welcome more detailed explanation, for much of the text is so condensed as to be heavy going for him. The section on following trust property, pp. 131–3, requires some revision in the light of *Ministry of Health* v. *Simpson* [1951] A.C. 251.

Executorship for Everyman. By A. C. Cope, Hadleigh: Tower Bridge Publications, Ltd. 1951. viii and 89 and (index) 3 pp. (5s. net.)—This booklet will ease the task of the lay executor and make for a better understanding between him and his solicitor. His duties are set out and explained in language free from technical jargon, and he is told, early on, how he may renounce. The chapters deal progressively with the subject of estate administration, practical examples are given of accounts and of the actual task of administering. Attention is drawn to the valuable services of the Personal Application Department of the Principal Probate Registry. Armed with this no executor should get into trouble : he will certainly know when professional advice is required.

Share Transfer and Registration. By A. K. Martin, f.c.i.s., London : Stevens & Sons, Ltd. 1951. xii and 133 and (index) 6 pp. (30s. net.)—This is the second volume in the *Business Law and Administration* series. Part I deals with the administrative procedure for the registration of transfers; and Part II with the various registers that are required to be kept by a company. The Appendix contains sixteen specimens of forms with which a registrar constantly has to deal. The book has been primarily written for secretaries and registrars of limited companies and to help students

preparing for the examinations of the Chartered Institute of Secretaries.

Company Meetings. By W. F. Talbot, F.C.I.S., F.T.I.I. London: Stevens & Sons, Ltd. 1951. xii and 166 and (index) 12 pp. (22s. 6d. net.)—This is a further volume in the *Business Law and Administration* series and covers the relevant part of the examination syllabus of the Chartered Institute of Secretaries. It is a practical account of the law conduct and procedure of company meetings. It is well illustrated with practical examples, forms and draft resolutions. A sampling of sections dealing with matters of law shows that they are accurate and clearly explained.

An Outline of the Law of Landlord and Tenant. By A. M. Wilshere, M.A., LL.B., Barrister-at-Law. Third Edition. By V. G. Wellings, M.A., Barrister-at-Law. London. Sweet & Maxwell, Ltd. 1951. xiv and 107, and (index) 6 pp. (10s. net.)—This is a well arranged and accurate outline of the main common law and statutory rules governing the relationship of landlord and tenant. The case law has been brought up to date, and the provisions of the various Rent Restrictions and Rent Control Acts to 1949 are summarised at pp. 16–19 and 69, and the Agricultural Holdings Act, 1948, at pp. 26–32.

The State is at Your Service. By Derek H. Hene, M.A. (Cantab.), of the Inner Temple and the South-Eastern Circuit, Barrister-at-Law. London: A *Daily Express* Publication. 1952. 48 pp. (2s. net.)—In his Foreword the Rt. Hon. Viscount Simon states that the author has provided a brief, clear, accurate and up-to-date account of the services which the State provides to the individual, and the practical steps to be taken in claiming and obtaining them. It covers everything from the cradle to old age.

Your Family and the Law. By Robert S. W. Pollard, J.P., London. C. A. Watts & Co., Ltd. 1952. 90 pp. (1s. net.)—Mr. Pollard is admirably qualified to write on this subject and he gives a clear and accurate account in four chapters of the many problems of law connected with Marriage, Divorce, Birth and Death. It contains useful suggestions for reforms, and a list of Further Sources of Information. The publishers are to be congratulated on producing such a useful and attractive book at the very modest price of one shilling.

Stephen's Commentaries on the Laws of England. Second annual cumulative Supplement to the Twenty-first Edition. By L. Crispin Warmington, Solicitor of the Supreme Court (Honours). London: Butterworth & Co. (Publishers), Ltd. 1951. 30 pp. (5s. net; Main Work and Supplement £6 15s. net.)—This contains some amendments of the text of the main work and incorporates the new law up to January 1, 1951.

The Lawyer's Companion and Diary for 1952. Part I, by Ernest L. Buck; Part II, by Leslie C. E. Turner. London: Stevens & Sons, Ltd., Shaw & Sons, Ltd. xxiv and 1519 pp. (18s. net.)—This is now in its hundred and sixth year of publication and contains up-to-date information on costs and fees, duties and taxes, practice notes, miscellaneous information and a law list.

Police Law. Eleventh Edition. By C. M. Moriarty, c.b.e., ll.d., London: Butterworth & Co. (Publishers), Ltd., 1951. xx and 535 and (index and notes on emergency legislation) 61 pp. (12s. 6d. net.)—The merits of the "*Policeman's Bible*" are too well known to require commendation. This edition is up to date and contains 23 new statutes, 28 new statutory instruments and 22 new cases.

The Pocket Law Lexicon. Eighth Edition. By W. A. Motion, m.a., ll.b., of the Inner Temple, Barrister-at-Law, London: Stevens & Sons, Ltd. viii and 419 pp. (17s. 6d. net.)—The previous edition was reviewed in the C. L. J., Vol. IX, 282. "Priority Notice" has now been corrected. "Subinfeudation" and "Quia (not quai, p. 311) Emptores" still need further explanation, and we are still told that the Year Books were taken by the chief scribes of the courts at the expense of the Crown. There are small slips at pp. 159 (*driot* for *droit*), 273 (*deendentis* for *defendentis*); p. 29 (*established* for *abolished*). The only information given about the Star Chamber is:—p. 67 "*Camera stellata—The Star Chamber,*" p. 347 "Star Chamber. See *Camera Stellata.*" A new feature is in the pronunciation of Latin words by phonetic spelling, in some cases it is the old, and in others the new pronunciation.

Law Relating to Hospitals and Kindred Institutions. Supplement to 1949 (Second) Edition. By S. R. Speller, ll.b., of Lincoln's Inn, Barrister-at-Law. London: H. K. Lewis & Co., Ltd. 1951. viii and 83 pp. and (index) 4 pp. (12s. 6d. net.)—This brings the main work up to date to July, 1951.

The Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951. By Robert Schless, of Gray's Inn, Barrister-at-Law, London: Butterworth & Co. (Publishers), Ltd. 1951. ix and 144 and (index) 10 pp. (17s. 6d. net.)—The purpose of the Act is to safeguard the civil interests of non-regular members of the Forces and also national service men. It is based on much of the legislation we became accustomed to during the War. After a general introduction, the text of the Act is set out with detailed explanatory notes on each section. The book is reprinted from Butterworth's Annotated Legislation Service.

A French-English English-French Dictionary of Legal Words and Phrases. Second Edition. By A. W. Dalrymple, M.A., Advocate. London: Stevens & Sons, Ltd. 1951. v and 218 pp. (21s. net.) (English-French and French-English Dictionaries are available separately. 12s. 6d. each.)—The new edition will be welcomed by all who have to deal with French law.

The Institutes of Justinian. Latin Text. London: Sweet & Maxwell, Ltd. viii and 101 pp. (12s. 6d. net.)—This is intended to accompany *The Elements of Roman Law* with a translation of the Institutes, by Dr. R. W. Lee, and should be very useful to Bar students.

"*This is the Law Series.*" London: Stevens & Sons, Ltd. 1951.

The Law of Wills. By Rupert Cross, M.A., B.C.L., Solicitor, Fellow of Magdalen College, Oxford. Second Edition. vii and 96 pp. (6s. net.)—The text has been amended, simplified and brought up to date. An accurate and valuable little book.

The Law of Rent Restrictions. By Esther Dangerfield, of Lincoln's Inn, Barrister-at-Law. xii and 130 and (index) 3 pp. (8s. 6d. net.)—An amazing feat in presenting the complex and obscure Rents Acts in language that can be understood by the layman. Difficult points are made clear by well selected practical examples. It has the blessing of Mr. Megarry—nothing more need be added.

Copyright and Industrial Designs. By A. D. Russell-Clarke, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. xv and 245 and (index) 15 pp. (37s. 6d. net.)—This book covers all the branches of copyright. Part I is a short historical survey; Part II deals with literary, dramatic, musical and artistic copyright under the Copyright Act, 1911; Part III covers industrial designs under the Registered Designs Act, 1949, and the Designs Rules, 1949; and Part IV deals with the overlapping between the two Acts. The author's book on Copyright and Industrial Designs (1930) is now brought up to date and incorporated in Part III of the present work. It is a useful and clear survey of the whole of the law on this specialised subject.

A Guide to the Microfilm Collection of Early State Records. Washington, D.C., Library of Congress. 1950. xxxviii and 718 pp. ($5.00 net.)—This tremendous task has been completed by the Library of Congress in association with the University of North Carolina under the direction of William S. Jenkins and edited by Lillian A. Hemrick. It is on 1,700 reels of microfilm which reproduce two and a half million pages, *i.e.*, 8,300 books of 300 pages each, yet the film can be stored in less than 26 cubic feet of space.

Positive copies of any film may be obtained from the Library. The films extend from the earliest records down to the date when the materials have become easily accessible. A wonderful achievement, indispensable to students of American law and government.

The Industrial Arbitration Act, 1912–1949. Western Australia. By F. T. P. Burt, LL.M.(W.A.), a practitioner of the Supreme Court of Western Australia, Perth : W. H. Wyatt, Government Printer. 1951. xxx and 164 and (index) 25 pp. (No price given.)—This is based on a thesis for the LL.M. degree of the University of Western Australia. It is a detailed annotation of the Act and brings it up to October, 1950. It contains a note on the Constitutional Position with regard to Arbitration, and the Arbitration Court's attitude to judicial precedent.

Suomen Lainopillinen Kirjallisuus, 1809–1948. Finlands Juridiska Litteratur. Littérature Juridique de la Finlande. Helsinki : Simpkin, Marshall, Ltd. xxxv and 1,047 pp. (Finnish mk. 4,730 net.)—This contains all the juridical literature concerning Finland during the period 1809–1948 with the titles of some 20,000 books and articles. The systematical part (pp. 1–857) is divided into the different branches of law and has 26 main chapters, sub-divided into numerous subsections. The registers (pp. 859–1047) contain an alphabetical index of authors and several subject indexes. The list of contents, directions for use and explanations are in French, Finnish and Swedish. It has been produced by a staff of editors working under Professor V. Merikoski, Dean of the Faculty of Law of Helsinki University.

The Basuto. By Hugh Ashton. Published for the International African Institute by the Oxford University Press. 1952. xi and 348 and (index) 5 pp. (35s. net.)—This most interesting book gives a comprehensive account of Basuto culture. Three of its chapters are devoted to Land Tenure, Judicial Organisation and Law.

Assessment and Rating. Third Edition. By H. E. Manning, K.C. Toronto : Cartwright & Sons, Ltd. 1951. lxiii and 793 pp. (No price given.)—The sub-title of this book is Municipal Taxation in Canada. Anyone concerned with the English rating system will find herein a number of most interesting matters for comparison.

Kenny's Outlines of Criminal Law. An entirely new edition. By J. W. Cecil Turner, M.C., M.A., LL.B., of the Middle Temple, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. Cambridge University Press. 1952. liv and 561 and (index) 14 pp. (42s. net.)

Pollock's Law of Torts. Fifteenth edition. By P. A. LANDON, M.A., M.C., Honorary Bencher of the Inner Temple; Fellow and Tutor, Trinity College, Oxford; Reader in Criminal Law, Oxford University; formerly Lecturer to the Law Society. London: Stevens & Sons, Ltd. 1951. xliv and 446 and (index) 38 pp. (63s. net.)

Shipping Law. By LORD CHORLEY, M.A., and O. C. GILES, LL.M. Second edition. London: Sir Isaac Pitman and Sons, Ltd. 1951. xxvi and 356 and (index) 8 pp. (30s. net.)

Law and Social Change in Contemporary Britain. Ey W. FRIEDMANN, LL.D.(London), DR.JUR.(Berlin), LL.M.(Melbourne), of the Middle Temple, Barrister-at-Law, Professor of Law, University of Toronto. London: Stevens & Sons, Ltd. 1951. xxiv and 313 and (index) 8 pp. (35s. net.)

Addington, Author of the Modern Income Tax. By A. FARNSWORTH, LL.D., PH.D. London: Stevens & Sons, Ltd. 1951. xii and 137 and (index) 3 pp. (21s. net.)

Crime and the Community. By FRANK TANNENBAUM. New York: Columbia University Press. London: Geoffrey Cumberlege. 1951. xiv and 478 and (index) 9 pp. (30s. net.)

Soviet Civil Law. By Dr. VLADIMIR GSOVSKI, Chief of the Foreign Law Section of the Library of Congress: Michigan University Press. London: Geoffrey Cumberlege, Oxford University Press. 1951. Vol. 1, xxxvii and 909 pp; Vol. 2, xx and 848 and (index) 59 pp. (120s. per set of 2 vols.)

The Hittite Laws. Translated into English and Hebrew, with Commentary. By E. NEUFELD, PH.D., D.LITT. London: Luac & Co., Ltd. 1951. xi and 196 and (indices) 13 and (Tablet photographs) 1 pp.

The Papers of Thomas Jefferson. Vol. 3, June, 1779, to September, 1780; Vol. 4, October, 1780, to February, 1781. JULIAN P. BOYD, Editor; LYMAN H. BUTTERFIELD and MINA R. BRYAN, Associate Editors. Princeton University Press. London: Geoffrey Cumberlege, Oxford University Press. 1951. Vol. 3, xxxiii and 672 pp.; Vol. 4, xxxviii and 702 pp. (80s. net each (Series Subscription 70s. each.))

Hugo L. Black. A Study in Judicial Process. By CHARLOTTE WILLIAMS. Johns Hopkins Press. London: Geoffrey Cumberlege. 204 pp. (28s. net.)

Administrative Agencies and the Courts. By Frank E. Cooper, of the Detroit Bar, Visiting Professor of Law, University of Michigan Law School. Michigan University Press. London: Geoffrey Cumberlege, Oxford University Press. 1951. xxv and 416 and (table of cases) 44 and (index) 10 pp. (40s. net.)

The Code of Maimonides, Book Twelve, The Book of Acquisition. Translated from the Hebrew by Isaac Klein, ph.d. Yale University Press. London: Geoffrey Cumberlege, Oxford University Press. 1951. xv and 328 and (index) 7 pp. (32s. 6d. net.)

The Leviathan and Natural Law. By F. Lyman Windolph. Princeton University Press. London: Geoffrey Cumberlege, Oxford University Press. 1951. xii and 144 and (index) 3 pp. (16s. net.)

Classical Roman Law. By Fritz Schulz. Oxford: Clarendon Press. 1951. xii and 633 and (index) 19 pp. (42s. net.)

Dymond's Death Duties. Eleventh edition. By Robert Dymond, Solicitor, formerly Deputy Controller of the Estate Duty Office, and Reginald K. Johns, ll.b., of the Estate Duty Office. London: The Solicitors' Law Stationery Society, Ltd. 1951. lxxxvii and 801 and (index) 54 pp. (75s. net.)

Eversley's Law of Domestic Relations. Sixth edition. By L. I. Stranger-Jones, m.a., of the Middle Temple and South-Eastern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. l and 697 and (index) 45 pp. (£3 15s. net.)

Warmington's Divorce. Second edition. By L. Crispin Warmington and B. Passingham, o.b.e. London: Law Notes Lending Library, Ltd. 1951. lix and 359 pp. (35s. net.)

Rayden on Divorce. Supplement to the Fifth edition: xxii and 239 pp. Second Cumulative Supplement to the Fifth edition: xxviii and 261 pp. London: Butterworth & Co. (Publishers), Ltd. 1951. (15s. net.)

The National Health Service Act, 1946, Annotated. Supplement to the 1948 edition. By S. R. Speller, ll.b. London: H. K. Lewis & Co., Ltd. 285 pp. (27s. 6d. net.)

Secretarial Practice. The Manual of the Chartered Institute of Secretaries. Sixth edition. Cambridge: W. Heffer & Sons, Ltd. 1951. x and 861 and (table of cases and index) 139 pp. (21s. net.)

Leading Cases in a Nutshell. Fourth edition. By E. S. Fay, M.A., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. ix and 166 and (index) 8 pp. (6s. 6d. net.) —This contains summaries of cases on Constitutional and Criminal Law, Tort, Contract, Evidence, Real Property and Equity.

English Legal History in a Nutshell. By Joseph Jackson, M.A., LL.M., of the Middle Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. viii and 103 pp. (6s. 6d. net.)

Evidence in a Nutshell. Fifth edition. By Monique S. Viner, B.A., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell Ltd. 1951. ix and 86 pp. (6s. 6d. net.)

Real Property in a Nutshell. Second edition. By H. J. F. Teague, LL.B., of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. vi and 178 and (index) 2 pp. (6s. 6d. net.) —One of the best in this series, thoroughly revised and up to date. A new chapter deals with the Town and Country Planning Act, 1947.

Graveson's Examination Note-Book of the English Legal System including a History of Judicial Institutions. Second edition. By Joseph Jackson, M.A., LL.B., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. xii and 117 and (index) 4 pp. (6s. 6d. net.) —Useful for revision. The technique of precedent is well summarised at pp. 8–11.

Scintillae Lucis. Concerning the Landlord and Tenant Act, 1927. A Supplement thereto by their Author, L. G. H. Horton-Smith, M.A., late Fellow of St. John's College, Cambridge, of Lincoln's Inn, Barrister-at-Law. London: The Referees (Landlord and Tenant Act, 1927) Association. Copies obtainable from the Hon. Treasurer, 5, Kensington Park Gardens. 1951. (5s. net.)

Statute Law Revision and Consolidation. Being the Presidential Address of the Rt. Hon. Viscount Jowitt, D.C.L., LL.D., Lord Chancellor, to the Holdsworth Club of the Faculty of Law, Birmingham University. Published by the Holdsworth Club. 1951. On sale at Sweet & Maxwell, Ltd. 20 pp. (2s. 9d. net.)

Year Book of Human Rights for 1949. Lake Success: United Nations. London: H.M.S.O. 1951. xvi and 402 and (indexes) 19 pp. (37s. 6d. net.).

The Impact of the Universal Declaration of Human Rights. New York: United Nations. London: H.M.S.O. 1951. 41 pp. (1s. 9d. net.)

The Suppression of Slavery. Memorandum submitted by the Secretary-General of the United Nations. New York: United Nations. London: H.M.S.O. 1951. 83 pp. (3s. 9d. net.)

International Monetary Fund. Annual Report, 1951. Washington: International Monetary Fund. 1951. 158 pp. (No price given).

Israel's Armistice Agreements with the Arab States. By SHABTAI ROSENNE, Legal Adviser to the Israel Ministry of Foreign Affairs. Published for the International Law Association, Israel Branch, Tel Aviv: Blumstein's Bookstores, Ltd. 1951. 93 pp. (12s. 6d. net.)

Selected Cases from Acta Dominorum Concilii et Sessionis. From May 27, 1532, the inception of the court, to July 5, 1533. Edited by IAN HAMILTON SHEARER, M.A., LL.B., Advocate, Edinburgh: Printed for the Stair Society by J. Skinner & Co., Ltd. 1951. xxiv, 173 and (bibliography) 3 and (indexes) 15 pp. (No price given.)

"*This is the Law*" *Series.* London: Stevens & Sons, Ltd.

Landlord and Tenant. By R. BORREGAARD M.A.(oxon), of the Inner Temple, Barrister-at-Law. Third Edition. 1951. x and 94 and (index) 8 pp. (6s. net.)

Trade Marks and the Law of Unfair Competition. By T. A. BLANCO-WHITE, of Lincoln's Inn, Barrister-at-Law. Second edition. 1951. xii and 72 and (index) 2 pp. (5s. net.)

Introduction to Economics. By ALEC CAIRNCROSS, Professor of Applied Economics at the University of Glasgow. London: Butterworth & Co. (Publishers), Ltd. 1951. viii and 581 and (index) 10 pp. (18s. 6d. net.)

Water Resources Law. The Report of the President's Water Resources Policy Commission, 1950. Vol. 3. Washington: U.S. Government Printing Office. 777 pp. (No price given.)

The Catholic Doctor. By FR. A. BONNAR O.F.M., D.D., M.SC. Fifth (revised) edition. London: Burns Oates and Washbourne, Ltd. 1951. 70 and (index) 9 pp. (12s. 6d. net.)

Das Schweizerische Zivilgesetzbuch in der ausländischen Rechtswentwicklung. By DR. ANDREAS B. SCHWARZ, ord. Professor des Zivilrechts und römischen Rechts an der Universität Istanbul, vormals ord. Professor and der Universität Zürich. Zürich: Schulthess & Co. A.G. 1950. 90 pp. (No price given.)

Verfassungswidrige Verfassungsnormen? By Dr.jur. Otto Bachof. Tübingen, Verlag J. C. B. Mohr (Paul Siebeck). 1951. 61 pp. (No price given.)

Lehrbuch des Völkerrechts. By Dr.jur. et Phil. Alf Ross, ordentlicher Professor des Völkerrechts an der Universität Kopenhagen. Stuttgart: Kohlhammer Verlag. 1951. 289 and (index) 6 pp. (No price given.)

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Communications concerning articles and notes should be sent to Professor S. J. Bailey, St. John's College, Cambridge. Books for review should be sent to The Cambridge Law Journal, *Squire Law Library, Cambridge.*

It is regretted that the limited space available for book reviews has made it necessary to give no more than short notices of some of the works received for review.